No. 340.

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JAMES H. McKENNEY,
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Brf. of Perkins, Comstock & Brown for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1900.

Filed Nov. 6, 1900.

No. 340.

JOHN H. GOETZE, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF JOHN H. GOETZE & CO.,

Appellant,

vs.

THE UNITED STATES,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT.

EDWARD C. PERKINS,
ALBERT COMSTOCK,
EVERIT BROWN,
Of Counsel with Appellant.

In the Supreme Court of the United States,

OCTOBER TERM, 1900.

JOHN H. GOETZE, doing business under the firm name and style of John H. Goetze & Co.,
Appellant,

vs.

THE UNITED STATES,
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BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal (R. p. 38) from a decision of the Circuit Court of the United States for the Southern District of New York (R. p. 35), affirming a decision of the Board of United States General Appraisers (R. p. 7), which overruled the appellant's protest and affirmed the decision of the Collector of the Port of New York assessing a duty under the Tariff Act of 1897 upon merchandise shipped from the port of Arecibo, in the island of Porto Rico, on May 27th, 1899, and brought into the port of New York on June 6th, 1899 (R. p. 6).

The Treaty of Paris was signed on December 10th, 1898. Porto Rico was then in the military occupation of the United States, the Spanish forces having been withdrawn in accordance with the peace preliminaries. The treaty was confirmed by the Senate on February 6th, 1899, and the ratifications

were exchanged and the treaty was proclaimed on April 11th, 1899 (30 St. at L., 1754–1762).

By Article II of the treaty (30 St. at L., 1754) "Spain cedes to the United States the Island of "Porto Rico." By Article IX (p. 1759) after a provision for the right of "Spanish subjects, *natives* "*of the peninsula*" to retain their nationality if they so elect, it is declared that "the civil rights "and political status of the *native inhabitants* of "the territories hereby ceded to the United States "shall be determined by Congress."

The Tariff Act of July 24th, 1897, imposes duties only upon "articles imported from foreign coun- "tries."

The appellant's claim to a return of the payment exacted from him by the Collector rests upon two propositions of law, one depending upon the Tariff Act, and the other upon the Constitution; they are:

1. That Porto Rico, when the appellant's goods were brought thence to New York, was "not a foreign "country"; so that they were not within the purview of the Tariff Act.

2. That Porto Rico, at that time, was within the United States; so that, if the Tariff Act were to be construed as imposing a tax upon merchandise so circumstanced, the imposition violated the provision of § 8 of Article I of the Constitution that "all Duties, "Imposts and Excises shall be uni- "form throughout the United States."

The learned Board of Appraisers, whose views are set forth in the opinion delivered by

Judge SOMERVILLE (R. pp. 8–21), held that "while Porto Rico was unquestionably a part "of the United States in the sense that "it was owned by this *Government*, and was com- "pletely under its sovereignty;" it was "foreign "to the United States for *fiscal* or *tariff* pur- "poses," because it had not "been brought under "the *domain* of the *nation* by special legislative "action by Congress" (18). They considered that it followed from this, that taxes might be collected under the authority of an act of Congress, without regard to the constitutional prescription of uniformity, and that such a question was essentially different from that which would have been presented if Congress had undertaken "to pass "laws for the government of this newly acquired "territory, and had passed a tariff act extending "over the Island, with rates of duty different from "those imposed by the general tariff laws appli- "cable to other parts of the country;" and upon the constitutionality of such action on the part of Congress they expressly declined to pass (R., p. 19).

The appeal from the Board of General Appraisers was argued before his Honor, Judge TOWNSEND, whose opinion, on affirming the Board's decision, will be found at pp. 21 to 35 of the Record.

The learned Judge did not find it necessary to consider, separately, the appellant's contention that the Tariff Act could not be interpreted as imposing a duty upon goods brought from Porto Rico after annexation, because, in his judgment, this contention fell to the ground if it were true that "Porto Rico was a foreign country, in the "sense that the constitutional provision for uni- "form duties does not apply to it" (R., p. 31); and his opinion is devoted to a discussion of that

question. His opinion may be summarized as follows, mostly in his own words:

"The sphere of application of the Constitution is "determined, not by considerations of title to "land, but by recognition of the status of its in- "habitants. New territory is not brought under "the Constitution by acquisition of the soil, * * * "but either by an incorporation of the inhabitants "into the Union, or by an extension of our laws "and institutions throughout the territory." This can be done only by treaty or by legislation. The treaty has not done so; on the contrary, the people of the Island are "left to find a determina- "tion of their status in congressional action." There has been no "extension of our laws and in- "stitutions to the Island" by Congress; and it is therefore "part of the United States, but still a "foreign country" (R., p. 26).

"The power to *hold territory* without incorpor- "ating it as an integral part under its organic law "is an ordinary attribute of sovereignty" which the States "possessed before the formation of the "Union" and which "*they* delegated to the Fed- "eral Government in the treaty and war-making "powers" (R., p. 31).

"Our Government" may, therefore, "by treaty "accept the title and sovereignty over territory "and at the same time preserve its status as a "foreign country so far as its internal relation to "us is concerned" (R., p. 27).

"From the standpoint of international law, as "regards other nations, Porto Rico is annexed to "the Union and has become fully a part of the "United States. The title to the soil is in us as "exclusively as is that to any portion of this "continent. *Its political status is determined* "*by the treaty.* It is now a part of "our dominion, undistinguishable from any

"other part of the United States, so far as "other powers are concerned" (R., p. 25); but "*from the standpoint of constitutional law*" (R., "p. 25) "the Treaty of Paris * * * left the "political status of the inhabitants of Porto Rico "unchanged. Their status at the time of ces- "sion was * * that of inhabitants of a foreign "country as regards the Constitution of the United "States and within the meaning of the Tariff Acts. "The treaty of cession did not change that "status, and as Congress had not acted at the "time of this importation, Porto Rico was still a "foreign country in the sense of the tariff law, "and duties were lawfully assessed on the arti- "cles imported therefrom" (R., p. 35).

From the decision entered accordingly this appeal was taken direct to this Court, the case coming within § 5 of the Act of March 3d, 1891. The appeal was certified to and allowed by the Circuit Court pursuant to § 15 of the Act of June 10th, 1890 (R., p. 39).

Specification of Errors.

The decree is alleged by the appellant to be erroneous, in that it affirms, instead of reversing, the decision of the Board of General Appraisers, and in that it was thereby held that the exaction of which the appellant complains was both directed by the Tariff Act and sanctioned by the Constitution.

The errors into which we conceive the learned Judge below to have fallen, in reaching the conclusion of which we complain, consisted:

1. In holding that Porto Rico, whether a colony, dependency, territory, province or what not, was within the meaning of the Tariff Act *a foreign country* although in the permanent and exclusive control and dominion of the United States.

2. In holding that Porto Rico, when annexed by this nation, did not become a part of the United States within the meaning of the provision of the Constitution, which requires that "all duties, im- "posts and excises shall be uniform throughout " the United States."

3. In holding that it was the meaning and intent of the Treaty of Paris, that Porto Rico should be governed as a foreign country without regard to constitutional restrictions, and that the treaty was effectual, under the Constitution, to accomplish this result.

4. In holding that it depends upon the will of the Government whether upon an annexation of new territory it shall exercise unrestricted power therein, or only the restricted powers conferred upon the Government by the Constitution.

ARGUMENT.

Introductory.

According to our views, the meaning of the words " imported from foreign countries," has nothing to do with the extent of the powers of the Government in exercising its functions in Porto Rico, or with the existence, or the extent, of social or civil rights of its inhabitants. It is a mere question, and as we believe a plain question, whether from those words there can be deduced an intention on the part of Congress to levy a tax on goods brought from *any place* within the dominion of the nation to another. It relates, to paraphrase the words of Daniel Webster in his argument in *Fleming* v. *Page* (cited *infra*) to "our own office" in New York ; " it has no connection with contributions

"levied" in Porto Rico "or collecting duties "there."

So, again, we consider the meaning of the uniformity clause in the Constitution, and its application to the present case, as not depending upon the broader question, whether the legislative intent and constitutional effect of the Treaty of Paris was to give to the government—as distinguished from the Nation—an unlimited, or a limited, dominion over the Island. So far as the two questions are related, we rather believe that the question whether the powers of the government are unlimited will be answered, in one aspect at least, by determining whether the meaning of that phrase is not, that all duties, etc., must be uniform throughout all territory within the national dominion.

It might be more orderly to present our argument upon these our primary claims, before proceeding to wider considerations which really belong to our reply to the attempt of the government to meet them; but we find that it will save some repetition, and altogether be more convenient, if we reverse our natural course, and follow, to some extent at least, the order of argument adopted in the opinion of the learned Judge below.

In order to avoid any misunderstanding of the appellant's claim, and in order, also, to simplify our argument, it will be well, before entering upon controversial questions, to state at once the matters as to which there need be no dispute. Let it be understood, then, at the outset, that we unreservedly make these.

CONCESSIONS:

1. That the People of the United States is an absolute sovereign nation, and is, humanly speak-

ing, omnipotent; and that the Constitution of the United States is a mere expression of the will of the People, and subject to alteration or annihilation at its pleasure.

2. That the power to declare and carry on war has been, fully and without restrictions, delegate by the People to its constitutional agents; and that it includes the power to occupy foreign territory, and to govern it and its inhabitants while it remains foreign territory, subject only to the rules and usages of civilized warfare under international law.

3. That the People has, by implication, delegated to its constitutional agents the power to add permanent acquisitions to its territory, for certain purposes at least; and that when such an acquisition is made, it must conclusively be presumed, by the Judicial branch of the Government, that it was made for those purposes alone, for which the power was delegated.

4. That the war power, to the full extent admitted above, does not cease with the mere cessation of hostilities, but continues in full force until the power permanently to acquire territory is exercised, or until the occupation is terminated.

5. That the suffrage, the right of representation, and other political franchises, may be granted to, or withheld from the inhabitants of such annexed territory according to the discretion of the Congress of the United States, until the territory becomes a State, or a part of a State.

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I.

The People of the United States, in organizing the Government of the United States, have established certain limits never and nowhere to be transcended; and that those limits may not be transcended, the Constitution is written.

Constitutional limitations are the ubiquitous concomitants of constitutional powers.

1.

THE CLAIM OF UNLIMITED POWER IN NEW TERRITORY IS OPPOSED TO OUR ENTIRE THEORY OF CONSTITUTIONAL GOVERNMENT.

The decision of the Circuit Court is not based upon any consideration, either of the nature of the particular power of whose abuse the appellant complains, or of the particular limitation of that power which he invokes.

The pretensions which it sustains relate to the exercise of all conceivable powers of government, and the only limitation which they contemplate is the limitation of constitutional limitations.

These pretensions are put forth in the behalf, not of the people of the United States, but of the Government of the United States.

But the government finds its origin, its powers, and all its attributes in the will of the people, nowhere expressed but in the Constitution of the United States. There is then no government of the United States but that ordained in the Constitution, and no powers have been conferred upon it

except by the Constitution. That any power which it can exercise anywhere, is necessarily derived from the Constitution, must be conceded.

These mere truisms are fatal to the claim of the government at the very moment when it is fully stated, with all its logical consequences.

The claim made by our opponents is, that the government of the United States has power to extend the national dominion, by cession or by conquest, to every part of the world, and to govern all territory so acquired, according to its own unlimited will and discretion; for the concession that "a republic cannot be allowed to govern without any restraint" (*R.* p. 33), is valueless when coupled with the assertion that there is no definition or limitation of its powers.

It amounts, then, to no less than this: that, so far as concerns such territory, the supreme will of the people stopped short at the mere organizing of the Government, and established no limit which it could not transcend; or, in other words, that it did not provide a written Constitution for the whole, but only for a part, of the national dominion.

> "The original and supreme will organizes
> "the Government, and assigns to different de-
> "departments their respective powers. *It*
> "*may either stop here*, or establish certain
> "limits not to be transcended by those depart-
> "ments.
> "*The Government of the United States is of*
> "*the latter description.* The powers of the
> "legislature are defined and limited, and that
> "these limits may not be mistaken or for-
> "gotten, the Constitution is written."
>
> *Per* MARSHALL, C. J., in *Marbury* v. *Madison*, 1 Cr., 176.

We are now told that the one and only Govern-

ment of the United States, is "of the latter description," only when it acts within certain geographical boundaries; and that everywhere else the Constitution is not a constitution, in the American sense of the term, but a delegation of universal power.

It is not too much to say, that such a claim strikes at the very foundation of our whole system of constitutional government.

> "When we consider the nature and theory "of our institutions of government, the principles upon which they are supposed to rest, "and to review the history of their development, we are constrained to conclude that "they do not mean to leave room for the play "and action of purely personal and arbitrary "power. Sovereignty itself is, of course, not "subject to law, for it is the author and source "of law; but in *our system*, while *sovereign* "*powers* are delegated to the agencies of the "government, sovereignty itself remains with "the people, by whom and for whom all government exists and acts. And THE LAW IS "THE DEFINITION AND LIMITATION OF POWER" (MATTHEWS, J., in *Yick Wo* v. *Hopkins*, 118 U. S., 370).
>
> "The theory of our governments, both "State and National, is opposed to the deposit "of unlimited power *anywhere*. The executive, the legislative and the judicial branches "of these governments are all of limited and "defined powers" (MILLER, J., in *Loan Assoc'n* v. *Topeka*, 20 Wall., 663).

We assert, then—and we repeat that we are asserting the merest truism—that the People of the United States have established, by the Constitution, one national government, of defined and enumerated

powers, which, wherever it exercises those powers, is restricted, not only to those means which are "appropriate and plainly adapted to the end in "view," but to those which are "not prohibited, "but consist with the letter and spirit of the Con- "stitution."

And if we had no other ground for asserting that the powers of that government were limited, wherever its dominion is exercised, we should find one amply sufficient in the fact that the Constitution contains express prohibitions framed in terms universal and unqualified.

Being universal and unqualified, these prohibitions necessarily restrict the Government, so far as concerns the powers to which they apply, wherever it may act in the exercise of its delegated dominion; and as much when it exercises the delegated power to acquire and govern new territory, as in any other case.

And, it being thus demonstrated that *those* restrictions are universal in their application, there is no reason—even if it were not otherwise contrary to reason—to question the universality of the *implied* restrictions which are welded into the framework of our whole system of constitutional government.

2.

"INCORPORATION UNDER OUR ORGANIC LAW."

We believe that in our attempt to state the claim, which we are endeavoring to refute, we have not stated it one whit more broadly than in the form in which it is upheld by the learned Judge in the Circuit Court, when he speaks of the Government as possessing "the power to acquire territory without *incorporating it as an integral part under its organic law*," or where he

speaks of the "*sphere of application* of the Constitution" as being subject to extension, or expansion, at the will of the Government.

What is meant by holding Porto Rico as a colony, or as a dependency, except merely this, that it is to be governed by the same government as ourselves, without regard to those restrictions which stand between it and us? If we find that Porto Rico must be governed under those same restrictions, we shall also have found that it is untrue that Porto Rico has not been "incorporated as an integral part under our organic law."

Such expressions as "*incorporation* under the Constitution," "*extension* of our organic law," "extension of our institutions," "application of the Constitution *ex proprio vigore*," and the like, are mere metaphors, and like most metaphors, they are not only infelicitous but misleading. If the Constitution is viewed as some sort of a substance, possessing dimensions and the other properties of matter, it is not unnatural to infer that some outside force is needed to enlarge or extend its volume. But if, without using metaphors, we regard it as what it actually is—an instrument by which the People of the United States have delegated certain powers to their agents thereby appointed, it is self-evident that those agents, when—as the instrument empowers them—they enlarge the territorial limits of their operation, are, none the less, restricted to the powers which it confers upon them.

The notion that a Government which lives and moves and has its being only in the Constitution, when, by virtue of an implied power conferred upon it by that Constitution, it adds to the domain of the nation, projects out of itself a sort of astral body, free from the infirmities to which itself is heir, can hardly be refuted in any other way. It

would be as well for those who entertain such pretensions to assert, out and out, that Porto Rico, or the Philippines, belong, not to the United States, but to the President, or to the Congress, or, as the learned Board of Appraisers actually did say, *to the Government* (R. p. 18). If they were acquired by the United States, belong to the United States, it is by virtue of the Constitution only. If the power to control and govern them is in any branch of the Government of the United States, it is derived from the Constitution. It certainly is so derived if it depends upon the power of Congress to "make all needful rules and regulations respecting the territory belonging to the United States."

To this extent, at least, then, the Constitution does "extend to Porto Rico." It is "incorporated under our organic law" in the sense that it is only from "our organic law" that the power to acquire it is derived, and only in our organic law that the power to govern it, and its inhabitants, can be found. There are many provisions in the Constitution which are clearly universal in their application; no one, we presume, would question the power of the President to veto an act for the government of Port Rico or the Philippines; no one, probably, would question that all executive and judicial officers appointed to exercise authority there, must "be bound by "oath or affirmation to support this Constitution." In these respects at least, then, it is not possible to claim that it is in the discretion of the government whether those countries shall be "incorpo- "rated under our organic law." On the other hand, the Constitution contains many provisions which in their nature or by their very terms refer only to governmental action with regard to the people in the States. And there are others--such

as that which empowers the Congress to make all needful rules and regulations concerning the territory, etc., of the United States, and that empowering it to exercise exclusive legislation in all cases whatsoever in the District of Columbia, which evidently apply only outside of the States.

If any question be open for discussion, then, it is, not whether the Constitution, "applies," *en bloc*, to territory acquired by the nation, but whether, in acquiring or in governing national territory, as in the exercise of any other power, express or implied, this or that particular provision of the Constitution relates to the particular exercise of power which may be in question.

3.

THE EXPRESS PROHIBITIONS IN THE CONSTITUTION.

In enlarging upon these general principles, and in particularly applying them to the case at bar, it will be well for us to have the benefit of the light shed upon their application to the power to acquire and govern new territory in the adjudged cases in this Court. We propose, therefore, to examine at once the authorities upon the subject. And we find those authorities to be most numerous, and most directly in point, which relate to the scope and effect of those express prohibitory clauses of the Constitution to which we have alluded. Such are the provisions as to the suspension of the writ of *habeas corpus*, as to bills of attainder and *ex post facto* laws, and others in Art. I, § 9, the provision for trial by jury in § 2, and that respecting conviction of treason in §3, of Art. II., the Bill of Rights embodied in the first ten amendments, and the thirteenth and fifteenth, and in part the fourteenth, amendments. That all

these stand upon the same footing, so far as the present matter is concerned, will not, we presume, be disputed. There can be no question of their restrictive effect upon other powers than that of acquiring, or governing, new territory.

> "*Like the other powers granted to Congress* "by the Constitution, the power to regulate "commerce is subject to *all the limitations* "*imposed by such instrument*, and among "them is that of the Fifth Amendment, we have "heretofore quoted. Congress has *supreme* "*control* over the regulation of commerce, "but if, in exercising that supreme control, it "deems it necessary to take private prop- "erty, then it must proceed subject to "the limitations imposed by the Fifth "Amendment, and can take only on "payment of just compensation. The power "to regulate commerce is not given in any "broader terms than that to establish post "offices and post roads; but, if Congress "wishes to take private property upon which "to build a post office, it must either agree "upon a price with the owner, or in condemna- "tion pay just compensation therefor."
>
> BREWER, J. in *Monongahela Navigation Co.* vs. *U. S.*, 148 U. S., 312, 336.

4.

THE PROHIBITORY CLAUSES APPLY IN THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES.

The principle embodied in the decision just cited, applies as well to the implied power to acquire territory, and to the power to govern it—whether that be considered as a necessary implication from the power to acquire, or as being an

express power conferred by Art. IV, § 3, Subd. 2—as it does to the express power to regulate commerce. But, so far as the power to govern is concerned, its application has been definitely settled; and more particularly by the series of recent decisions of this Court which we will first examine:

Reynolds v. *United States*, 98 U. S., 145;
Callan v. *Wilson*, 127 U. S., 540;
Springville v. *Thomas*, 166 U. S., 707;
Baumann v. *Ross*, 167 U. S., 548;
Thompson v. *Utah*, 170 U. S., 343;
Capital Traction Co. v. *Hof*, 174 U. S., 1;
Black v. *Jackson*, 177 U. S., 363.

Reynolds v. *United States* (1878) involved the constitutionality of an act of Congress providing for punishment by fine and imprisonment of a person found guilty of bigamy in a territory or other place over which the United States had exclusive jurisdiction. One of the defences interposed by the plaintiff in error, who was indicted and tried for this offence in Utah, before its admission to Statehood, and who was a Mormon, was that the practice of polygamy was a part of his religion and a religious duty on his part; and that the act in question was therefore a violation of the provision of the Constitution (Amendment I) that "Congress "shall pass no law respecting an establishment of "religion, *or prohibiting the free exercise thereof*." WAITE, C. J., in delivering the opinion of the Court, said (p. 162):

"Congress cannot pass a law for the govern-
"ment of the territories which shall prohibit
"the free exercise of religion. The first amend-
"ment to the Constitution expressly forbids
"such legislation. Religious freedom is guar-

> " anteed everywhere THROUGHOUT THE UNITED
> " STATES, so far as congressional interference
> " is concerned. The question to be deter-
> " mined is, whether the law now under con-
> " sideration comes within this prohibition."

And in an earlier part of the opinion, dealing with the prisoner's right of challenge, the learned Chief Justice also said (p. 154):

> " By the Constitution of the United States
> " (Amend. VI), the accused was entitled to a
> " trial by an impartial jury."

In *Callan* v. *Wilson* (1887), the appellant had been convicted of conspiracy, upon a trial in the Police Court of the District of Columbia pursuant to Act of Congress (Rev. St., Dist. Col., § 1064). He claimed that " the Constitution of the United " States secured to him the right to be tried by a " jury, and, that right having been denied, the " Police Court was without jurisdiction to impose " a fine upon him, or to order him to be imprisoned " until such fine was paid." His claim was based upon the provision in the third Article of the Constitution, that " the trial of all crimes, except in " cases of impeachment, shall be by jury," etc.

HARLAN, J., in delivering the opinion of the Court, sustaining the appellant's claim and reversing the judgment below, said (p. 549):

> " As the guarantee of a trial by jury, in the
> " third article, implied a trial in that mode
> " and according to the settled rules of the com-
> " mon law, the enumeration, in the Sixth
> " Amendment, of the rights of the accused in
> " criminal prosecutions, is to be taken as a
> " declaration of what those rules were, and
> " is to be referred to the anxiety of
> " the people of the States to have in the

"supreme law of the land, and *so far as the* "*agencies of the General Government were* "*concerned*, a full and distinct recognition of "those rules, as involving the fundamental "rights of life, liberty, and property. This "recognition was demanded and secured for "the benefit of *all the people of the United* "*States*, as well those *permanently* or tempor- "arily residing in the District of Columbia, as "those residing or being in the several "States. There is nothing in the history of "the Constitution or of the original amend- "ments to justify the assertion that the people "of this district may be lawfully deprived of "the benefit of any of the constitutional "guarantees of life, liberty, and property— "especially of the privilege of trial by jury in "criminal cases. * * * In *Reynolds* v. "*United States*, 98 U. S., 145, 154, it was "taken for granted that the Sixth Amend- "ment of the Constitution secured to the "people of the territories the right of trial by "jury in criminal prosecutions; and it had "been previously held in *Webster* v. *Reid*, 11 "How., 437, 460, that the Seventh Amend- "ment secured to them a like right in civil ac- "tions at common law. We cannot think "that the people of this district have, in that "regard, less rights than those accorded to the "people of the territories of the United "States."

In *Springville* v. *Thomas* (1896) the question again arose in Utah; this time upon the validity of an act of the territorial legislature, providing that a verdict in a civil case should be valid upon the concurrence of nine jurors. The same question also arose at the same term in *American Publish-*

ing Company v. *Fisher* (166 U S., 464), but there was this material difference hetween the two cases: In the American Publishing Company's case, which was decided earlier than the other, the amount involved was over five thousand dollars, and the Court had general appellate jurisdiction (166 U. S. 466). In *Springville* v. *Thomas* the amount involved was less than five thousand dollars, and the Court only had jurisdiction in so far as the validity of any statute of, or authority exercised by, the United States was drawn in question in the Court below (23 St. at L. 443, § 2).

In the *Publishing Company's* case, the Court did not find it necessary to decide the constitutional question, because it held that the territorial act conflicted with the Act of Congress establishing a Territorial Government for Utah, and with a later act having more special reference to jury trials (467). BREWER, J., expressed some doubt upon the constitutional question, and the Court merely held that

> "either the Seventh Amendment to the "Constitution, or these Acts of Congress, or "all together, secured * * * the right to "a trial by jury," of which right "unanimity "was one of the peculiar and essential fea- "tures" (p. 468).

In the *Springville* case, however, the "statute of the United States," the "validity" of which was "drawn in question," was not the Act of the Territorial Legislature, but the Act of Congress establishing the Territory, which had been construed below as having "vested in the territorial legisla- "ture such unlimited legislative power as enabled "it to provide that unanimity * * * was not "necessary to a valid verdict." The Court had no

jurisdiction to pass upon the *construction* of the Act of Congress, but only upon its *validity*. It was therefore directly confronted with the question whether that "organic act," *as construed by the Court below*, was constitutional.

FULLER, C. J., who delivered the opinion of the Court (in which BREWER, J., appears to have concurred, as did the rest of the Bench), said (p. 708):

> "In the view which the Supreme Court" (of Utah) "took of the act it was obliged to subject it to the test of the Constitution, and accordingly in deciding that the Seventh Amendment did not require unanimity of action the Court held in effect that the act of Congress was constitutional although it empowered the territorial legislature to provide for verdicts by less than the whole number of jurors. The question involved was not matter of construction of the territorial act, but the Court discussed its validity, and this depended on the validity of the Act of Congress *giving it the scope which the Court attributed to it.*
>
> "In this there was error. In our opinion the Seventh Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases, and the act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so."

In *Bauman* v. *Ross* (1896) it was assumed by the Court that the Fifth Amendment was in force in the District of Columbia.

In *Thompson* v. *Utah* (1897) the question was as to the validity of a statute of the State of Utah, providing for the trial of criminal cases other than capital, by a jury of eight, as applied to a trial for

a crime committed before the admission of Utah as a State.

The Court held that it was not "competent for "the State of Utah, upon its admission into the "Union, to do in respect of Thompson's crime what "the *United States could not have done* while "Utah was a territory" (p. 350). This left to be decided the question whether an act of Congress providing for a trial by a jury of eight persons in the *Territory* of Utah would have conflicted with the provision of Art. III, § 2, of the Constitution quoted above; and the Court, *per* HARLAN, J., declared that it would (p. 347):

> "That the provisions of the Constitution re-
> "lating to the right of trial by jury in suits at
> "common law apply to the Territories of the
> "United States IS NO LONGER AN OPEN QUES-
> "TION" (citing *Webster* v. *Reid*, *Pub'g Co.* v.
> "*Fisher* and *Springville* v. *Thomas*, *supra*).
> "In the last-named case it was claimed that
> "the territorial legislature of Utah was em-
> "powered by the organic act of the Territory
> "of September 9, 1850, 9 St. 453, c. 51, § 6, to
> "provide that unanimity of action on the part
> "of jurors in civil cases was not necessary to
> "a valid verdict. This Court said 'in our
> "'opinion the Seventh Amendment secured
> "'unanimity in finding a verdict as an essen-
> "'tial feature of trial by jury in common law
> "'cases, and the Act of Congress could not
> "'impart the power to change the constitu-
> "'tional rule, and could not be treated as at-
> "'tempting to do so.'"
>
> "It is equally beyond question that the
> "provisions of the National Constitution re-
> "lating to trial by jury for crimes and to
> "criminal prosecutions apply to the territories
> "of the United States" (citing *Reynolds* v. *U. S.* and *Callan* v. *Wilson*, *supra*.)

BREWER and PECKHAM, JJ., dissented, but whether upon this point or upon the question whether the State law was *ex post facto* does not appear; presumably the latter, as they concurred in the unanimous opinion of the Court in the subsequent case of *Capital Traction Company* v. *Hof* (1898).

In that case the plaintiff in error claimed that an Act of Congress authorizing a trial *before a Justice of the Peace* with a jury, in civil cases involving over twenty dollars, and providing for an appeal and a retrial by jury in the Supreme Court of the District, was unconstitutional. The Court held that a trial before a Justice of the Peace, with a jury, was not "trial by jury" within the meaning of the Seventh Amendment, but that the constitutional rights of the plaintiff in error were secured to him by the provision for an appeal and a jury trial, and were "not unduly obstructed" (p. 45) by a provision requiring the appellant to give security to satisfy the judgment of the Appellate Court. BREWER, J., dissented from so much of the opinion *as upheld the constitutionality of this latter provision.*

GRAY, J., in delivering the opinion of the Court, said (p. 5):

> "The Congress of the United States, being "empowered by the Constitution 'to exercise "'exclusive legislation in all cases whatso-"'ever' over the seat of the National Govern-"ment, has the entire control over the District "of Columbia for every purpose of govern-"ment, National or local. It may exercise "within the District all legislative powers that "the legislature of a State might exercise "within the State; and may vest and distribute

"the judicial authority in and among Courts "and Magistrates, and regulate judicial pro- "ceedings before them, as it may think fit, *so "long as it does not contravene any provision "of the Constitution of the United States*" (*citing cases*).

"*It is beyond doubt, at the present day, "that the provisions of the United States "securing the right of trial by jury, whether "in civil or criminal cases, are applicable in "the District of Columbia.*"

And as recently as March of this year, HARLAN, J., in delivering the opinion of the Court in *Black* v. *Jackson*, *supra*, reversing a judgment of the Supreme Court of Oklahoma Territory sustaining a judgment in a lower Court for a mandatory injunction to put the plaintiff in possession of land the title to which was in dispute between him and the defendant, said, in answer to the suggestion that the other remedies open to the plaintiff were "not sufficiently efficacious" (177 U. S., 363):

"The suggestion referred to leaves out of "view the distinction made by the Constitu- "tion of the United States between cases in "law and cases in equity. * * * And it "also fails to recognize the provisions of the "Seventh Amendment securing the right of "trial by jury in 'suits at common law' where "the value in controversy exceeds twenty dol- "lars. THAT AMENDMENT, so far as it se- "cures the right of trial by jury, APPLIES TO "JUDICIAL PROCEEDINGS IN THE TERRITORIES "OF THE UNITED STATES."

We have cited indiscriminately the cases relating to the Territories and those relating to the District of Columbia, because they are treated by this Court as resting upon the same principle. It

is evident that this is so, there being no distinction to be drawn between the power to make rules and regulations respecting the territory of the United States, and the power to exercise *exclusive legislation, in all cases whatsoever*, in the District; none, at least, which would tend to give less effect to the constitutional prohibitions in the former case than in the latter.

It is noteworthy that the decisions in all these cases—unless we are mistaken as to the ground of dissent of BREWER and PECKHAM, JJ., in *Thompson* v. *Utah*—have been unanimous on the point to which we cite them. Every member of the Bench as it is now constituted has participated in one or more of them, and the same is true, with, we believe, a single exception, of every one of its distinguished occupants since 1878.

To these authorities should be added the observation of Mr. Justice SHIRAS, in *Wong Wing* v. *U. S.*, 163 U. S., 228, upon Mr. Justice FIELD's statement in *Yick Wo* vs. *Hopkins*, 118 U. S., 369, that the provisions of the Fourteenth Amendment to secure life, liberty and property "are universal in their application to all persons within the territorial jurisdiction." Says the learned Judge (p. 238):

> "Applying this reasoning to the Fifth and
> "Sixth Amendments, it must be concluded
> "that *all persons within the territory of the*
> "*United States* are entitled to the protection
> "guaranteed by those amendments."

5.

EARLIER CASES.—WEBSTER *v.* REID.
THE DRED SCOTT CASE.

So far back as 1850, the question was considered

by this Court in a case which it has since repeatedly cited as in point:

Webster v. *Reid*, 11 How., 437.

The case turned upon the validity of a statute of the territory of Iowa, providing for the trial without a jury of a certain class of actions at law, founded on contract. The Court said (per McLean, J., p. 460):

> "By the seventh article of the amendments
> " of the Constitution it is declared, 'In suits
> " 'at common law * * * the right of trial
> " 'by jury shall be preserved.' The organic
> " law of the territory of Iowa, by express pro-
> " vision, and by reference, extended the laws
> " of the United States, including the ordinance
> " of 1787, over the territory, so far as they are
> " applicable.
>
> "The act under which the above proceeding
> " was had prohibited the trial by jury in mat-
> " ters of fact on which the suits were founded.
> " In this respect the act was void."

The Court thus deliberately passed upon the *constitutional* question, although it is true that they found equal grounds for their conclusion in the act of Congress constituting the organic law of Iowa territory (5 St. at L. 235, § 12).

Again, the question was *considered*—we will not say *decided, for there was no controversy upon it*—in

Dred Scott v. *Sanford*, 19 How., 393.

One of the questions—we will not say which arose, but—upon which the Court undertook to pass in that celebrated case, was the validity of the Missouri Compromise Act, which prohibited slavery in that part of the Louisiana

Purchase lying north of 36° 30′ north latitude and not included in the limits of the State of Missouri. In the opinion of Chief Justice TANEY, called the "Opinion of the Court," he states the question to be, not whether "the Constitution ex-" tends to the Territories," but "whether Congress "was authorized to pass this law under any of the "powers granted to it by the Constitution" (p. 433). He holds that the "rules and regulations" clause does not apply to territory other than that owned or claimed by the United States at the time of the adoption of the Constitution (pp. 433–447); derives its power of government, which he fully admits, from the power to admit new states (p. 447); but finds a limit to such power when it infringes upon the personal rights, or the right of property of a citizen (pp. 449–451). Upon this major premise, and upon the minor premise that the right of property in a slave is distinctly and expressly affirmed in the Constitution (p. 451) he reached the conclusion that the Missouri Compromise was unconstitutional.

Now it was *solely upon the minor premise* that there was any disagreement as to the Missouri Compromise between any of the Judges who considered that point in the case. As to that minor premise, or, of course, as to the conclusion which was reached, it is needless to say more; but we are ready to endure what odium we may incur for asserting, that the argument with which the Chief Justice concluded his treatment of what we have called his *major premise* and which bears most directly upon the question with which we are concerned in the case at bar, is incontrovertible and irrefutable. Before quoting it, however, we will take the precaution of fortifying ourselves behind the opinions of the dissenting judges CURTIS and MCLEAN.

These Judges differed from the Chief Justice in that they derived the power to govern the territories from the "rules and regulations clause"; but Judge CURTIS, upon concluding that part of his opinion relating to the source of this unquestioned power, continues as follows (p. 614):

> "If, then, this clause does contain a power "to legislate respecting the territory, what "are the limits of that power?
>
> "To this I answer, that, *in common with all "the other legislative powers of Congress*, it "finds limits in the express prohibitions on "Congress *not to do certain things;* that, "in the exercise of the legislative power, Con- "gress cannot pass an *ex post facto* law or bill "of attainder; and *so in respect to each of the "other prohibitions contained in the Constitu- "tion*" (p. 614).

And later, reverting to the same subject, he says again (p. 623):

> "I desire to say, that if it were not for my "anxiety to insist upon what I deem a correct "exposition of the Constitution, if I looked "only to the purposes of the argument, the "source of the power of Congress asserted in "the opinion of the majority of the Court "would answer those purposes equally well. "For they admit that Congress has power to "organize and govern the Territories until they "arrive at a suitable condition for admission "to the Union; they admit, also, that the kind "of Government which shall thus exist should "be regulated by the condition and wants of "each territory, and that it is necessarily com- "mitted to the discretion of Congress to enact "such laws for that purpose as that discretion "may dictate; and no limit to that discretion

" has been shown or even suggested, *save those* " *positive prohibitions to legislate, which are* " *found in the Constitution.*

" I confess myself unable to perceive any " difference whatever between my own opinion " of the *general extent of the power of Con-* " *gress* and the opinion of the majority of the " Court, save that I consider it derivable from " the express language of the Constitution, " while they hold it to be silently implied " from the power to acquire territory" (p. 423).

So, too, McLEAN, J., after quoting from the opinion of MARSHALL, C. J., in *American Ins. Co. v. Canter*, says (p. 542):

" Did Chief Justice Marshall, in saying that " Congress governed a Territory, by exercising " the combined powers of the Federal and State " Governments, refer to unlimited discretion? " A Government which can make white men " slaves? Surely, such a remark in the argu- " ment must have been inadvertently uttered. " On the contrary, there is no power in the " Constitution by which Congress can make " either white or black men slaves. In organ- " izing the Government of a Territory, Con- " gress is limited to means appropriate to the " attainment of the Constitutional object. *No* " *powers can be exercised which are prohibited* " *by the Constitution, or which are contrary* " *to its spirit;* so that, whether the object " may be the protection of the persons and " property of purchasers of the public lands, " or of communities who have been annexed " to the Union by conquest or purchase, they " are initiatory to the establishment of State " Governments, and no more power can be

"claimed or exercised than is necessary to the "attainment of the end. This is the limita- "tion of all the Federal powers."

* * *

"If there be a right to acquire territory, "there necessarily must be an implied power "to govern it. * * * In such cases, no im- "plication of a power can arise which is in- "hibited by the Constitution, or which may "be against the theory of its construction. "* * * I would here simply remark, that "the Constitution was formed for our whole "country. AN EXPANSION OR CONTRACTION "OF OUR TERRITORY REQUIRED NO CHANGE IN "THE FUNDAMENTAL LAW" (pp, 543, 544).

We are now prepared to see whether there is anything heterodox in the views of the majority of the Court upon this subject:

TANEY, C. J. (p. 449):

"But the power of Congress over the person "or property of a citizen can never be a mere "discretionary power under our Constitution "and form of Government. The powers of "the Government and the rights and privi- "leges of the citizen are regulated and plainly "defined by the Constitution itself. And when "the Territory becomes a part of the United "States, the Federal Government enters into "possession in the character impressed upon "it by those who created it. It enters upon it "with its powers over the citizen strictly de- "fined, and limited by the Constitution, from "which it derives its own existence, and by "virtue of which alone it continues to exist "and act as a Government and sovereignty. "It has no power of any kind beyond it; and "it cannot, when it enters a Territory of the

"United States, put off its character, and as-
"sume discretionary or despotic powers which
"the Constitution has denied to it. It cannot
"create for itself a new character separated
"from the citizens of the United States, and
"the duties it owes them under the provisions
"of the Constitution. The Territory being a
"part of the United States, the Government
"and the citizen both enter it under the au-
"thority of the Constitution, with their re-
"spective rights defined and marked out; and
"the Federal Government can exercise no
"power over his person or property, beyond
"what that instrument confers, nor lawfully
"deny any right which it has reserved.

"A reference to a few of the provisions of
"the Constitution will illustrate this proposi-
"tion.

"For example, no one, we presume, will
"contend that Congress can make any law
"in a Territory respecting the establishment
"of religion, or the free exercise thereof, or
"abridging the freedom of speech or of the
"press, or the right of the people of the Ter-
"ritory peaceably to assemble, and to peti-
"tion the Government for the redress of
"grievances.

"Nor can Congress deny to the people the
"right to keep and bear arms, nor the right
"to trial by jury, nor compel anyone to be
"a witness against himself in a criminal pro-
"ceeding.

"These powers, and others, in relation to
"rights of person, which it is not necessary
"here to enumerate, are, in express and pos-
"itive terms, denied to the General Govern-
"ment; and the rights of private property
"have been guarded with equal care.

"Thus the rights of property are "united with the rights of person, and "placed on the same ground by the Fifth "Amendment to the Constitution, which pro- "vides that no person shall be deprived of "life, liberty, and property, without due "process of law. And an act of Congress "which deprives a citizen of the United States "of his liberty or property, merely because "he came himself or brought his property "into a particular Territory of the United "States, and who had committed no offense "against the laws, could hardly be dignified "with the name of due process of law.

"So, too, it will hardly be contended that "Congress could, by law, quarter a soldier "in a house in a Territory without the con- "sent of the owner, in time of peace; nor "in time of war, but in a manner prescribed "by law. Nor could they by law forfeit the "property of a citizen in a Territory who "was convicted of treason, for a longer "period than the life of the person convicted; "nor take private property for public use "without just compensation.

"The powers over person and property of "which we speak are not only not granted "to Congress, but are in express terms de- "nied, and they are forbidden to exercise "them. And this prohibition is not confined "to the States, but the words are general, "and extend to the whole territory over "which the Constitution gives it power to "legislate, including those portions of it re- "maining under Territorial Government, as "well as that covered by States. It is a total "absence of power everywhere within the "dominion of the United States, and places

"the citizens of a Territory, so far as these "rights are concerned, on the same footing "with citizens of the States, and guards them "as firmly and plainly against any inroads "which the General Government might at- "tempt, under the plea of implied or inci- "dental powers. And if Congress itself can- "not do this—if it is beyond the powers "conferred on the Federal Government—it "will be admitted, we presume, that it could "not authorize a Territorial Government to "exercise them. It could confer no power "on any local Government, established by its "authority, to violate the provisions of the "Constitution."

CAMPBELL, J.: "I look in vain, among "the discussions of the time, for the assertion "of a supreme sovereignty for Congress over "the territory then belonging to the United "States, or that they might thereafter acquire. "I seek in vain for an annunciation that a "consolidated power had been inaugurated, "whose subject comprehended an empire, and "which had no restriction but the discretion of "Congress. This disturbing element of the "Union entirely escaped the apprehensive "provisions of Samuel Adams, George Clin- "ton, Luther Martin and Patrick Henry; "and, in respect to dangers from power vested "in a central government over distant settle- "ments, colonies, or provinces, their instincts "were always alive. Not a word escaped "them, to warn their countrymen, that here "WAS A POWER TO THREATEN THE LAND- "MARKS OF THIS FEDERATIVE UNION, AND "WITH THEM THE SAFEGUARDS OF POPULAR "AND CONSTITUTIONAL LIBERTY; or that un- "der this article there might be introduced, on

"our soil, a single government over a vast ex-
"tent of country—a government foreign to the
"persons over whom it might be exercised, and
"capable of binding those not represented, by
"statutes, in all cases whatever. I find nothing
"to authorize these enormous pretensions,
"nothing in the expositions of the friends of
"of the Constitution, nothing in the expres-
"sions of alarm by its opponents—expressions
"which have since been developed as prophe-
"cies" (p. 505).

In the supplemental brief of Mr. Blair, of counsel with the plaintiff in error (U. S. Sup. Ct., Clerk's Office, Vol. I, 4-36, Dec. Term, 1856), we find this statement (p. 7):

"I admit that whether the power of Congress
"to legislate be given expressly or by implica-
"tion, it is given with the limitation that it
"shall be exercised in subordination to the
"the Constitution; and that if it be exercised
"in any violation of the Constitution—as for
"instance, by imposing a religious test—the
"act would be void. Subject to this limitation
"Congress is at liberty to adopt any means to
"accomplish its object (McCullough *v.* State
"of Maryland, 4 Cond. R., 482)."

So it appears that not only the views of the minority Judges, but even those of counsel for the defeated party, were, upon this question, in perfect harmony with those of the majority of the Court. And yet no more conclusive answer to the position of the majority could have been made, than that embodied in the contention of the appellee in the case at bar: granted that the Constitution forbids that any citizen of the United States should be deprived of his property, or of its unimpeded use and enjoyment wherever, under the ægis of the

Constitution, he may go; granted that slaves are property; when the citizen goes outside—not of the United States, but—of the States United, he is not protected by the Constitution; the Constitution cannot go there of itself, and it has not pleased our absolute and sovereign Government that the Constitution should accompany it there. "Our Government" has "preserved the status" of Minnesota "as a foreign country so far as its inter-" nal relation to us is concerned" (R., p. 27).

Such an argument did not commend itself, either to the wisdom of the dissenting Judges, or to the zeal of counsel, as worthy to be advanced in support of the freedom of Dred Scott.

6.

The principle of the decisions cited.

But while the authority of the series of adjudged cases to which we have referred is not questioned, so far as the actual conclusion reached in each of them is concerned, we are told, that they are not authorities in our favor, because the principles on which they were decided, and which we are seeking to maintain, are unsound. It is true, say our opponents, that Congress cannot pass a law prohibiting the exercise of religion in Utah, or abridging the right of trial by jury there, or in the District of Columbia; but this is not because the power of Congress, in legislating for territory not erected into a State, and for the inhabitants of such territory, is anything short of omnipotence, but because, in the case of Utah, "the Constitution was extended to it," both by the treaty under which it was acquired, and by the Act of Congress erecting it into a territory; and, in the case of the District of Columbia, because "it was carved out "of States which were under the Constitution"

(R., p. 29), and the Constitution, being incapable of contraction, as of expansion, continued to "apply" to it when it became a part of the national territory.

We suppose that the adjudications of this Court settle principles, as well as cases. The individual rights asserted in these cases were sustained without the slightest reference, by Court or counsel, to their resting upon any such grounds; nor would those grounds apply to the case of *Webster* v. *Reid*, which is cited and approved in the later decisions; but we will assume that these suggestions, if sound, would nullify all the decisions on which we rely, for they are susceptible of being met by direct and conclusive answers.

As to Utah: We will not pause to consider whether the effect of Art. IX of the Treaty of Guadeloupe Hidalgo (*Tr. & Conv.*, 686) was to make the provisions of the Constitution, or any of them, a part of the law of the territory ceded by Mexico to the United States, nor whether, until "at the proper time, to be judged of by the Con-"gress" the Territory should be incorporated into the Union as a State, or States, it did more than protect the Mexicans who remained there in the free enjoyment of their liberty, property and religion; or whether such a provision was a guaranty of trial by jury to people who had never enjoyed that right. We will assume, for the sake of argument, that the treaty contained a clause identical in effect with § 17 of the Utah organic act (9 St. at L., 453, c. LI) which provides that "the "Constitution and Laws of the United States are "hereby extended over and declared to be in force "in said Territory of Utah, so far as the same, or "any provision thereof, may be applicable."

Our assertion is, that such a provision, whether in a treaty or in an act of Congress, is a mere law,

subject to modification or repeal, at any time, by the legislative branch of the Government.

It follows, that if the rights asserted in the Utah cases were dependent merely upon such laws, the statutes before the Court for consideration, and which purported to take away, or to abridge those rights, were not void as they were held to be, but were a proper and ordinary exercise of that right of modification or repeal.

As was recently said by the learned Solicitor General of the United States (*"The Constitution and the New Territories," by John K. Richards, Solicitor General of the United States, an Address delivered before the Pennsylvania Bar Association, June 26, 1900, p. 4*):

> "If it takes action by Congress to 'extend' "the Constitution, in the sense of applying its "limitations and restrictions, evidently the "Constitution goes not as a Constitution but "as an act of Congress. Its provisions are "virtually incorporated into the act extend- "ing it and operate by adoption *as a legis-* "*lative enactment.*"

Evidently this is equally true of a treaty. A treaty, indeed may (to adopt the language of the learned Judge below) be a contract "in the international sense," but it is a mere law "in the constitutional sense."

> "A treaty is, *in its nature*, a contract be- "tween two nations, not a legislative act. It "does not generally effect, of itself, the object "to be accomplished, especially so far as its "operation is *infra* territorial; but is carried "into execution by the sovereign power of the "respective parties to the instrument.
>
> "In the United States, *a different principle* "*is established.* Our Constitution declares a

" treaty to be the law of the land. It is, con-
" sequently, to be regarded in Courts of
" Justice as equivalent to an act of the legis-
" lature, wherever it operates of itself without
" the aid of any legislative provision" (per
" MARSHALL, C. J., in *Foster* v. *Neilson*, 2
" Pet., 253).

And nothing is better settled than that a treaty is subject to modification and repeal by the Congress. It is not many years since this Court performed the painful duty of upholding the validity of a deliberate breach on the part of the United States of its solemn compact with China.

Chinese Exclusion Cases, 130 U. S., 581.

See also

Head Money Cases, 112 U. S., 580;
Horner v. *United States*, 143 U. S., 570;
Whitney v. *Robertson*, 124 U. S., 190;
The Cherokee Tobacco, 11 Wall., 616;
La Abra Silver Mining Co. v. *U. S.*, 175 U. S., 423.

AS TO THE DISTRICT OF COLUMBIA.—The conception of the Constitution as a body, or substance, which forms the basis of the opinion of the Court below, is now further defined, and we are instructed as to its species. It is a chattel real, and subject to the maxim, *quicquid plantatur solo, solo cedit*. We can only revert to our former assertion, that the Constitution is not a corporeal entity of any sort, but is, as MATTHEWS, J., says, " the defini-
" tion and limitation of power."

The argument, however, proves too much; if the inhabitants of the District of Columbia were entitled, under the classification of Constitutional law as a part of the law of fixtures, to all the rights

which were enjoyed, under the Constitution, by those who inhabited the same territory when it formed part of the State of Maryland, they would be entitled to the right to vote for Presidential electors, and for representatives in Congress.

The right of trial by jury, in general, in that territory, depended, before its cession to the United States, not on the Constitution of the United States, but on that of the State of Maryland, and could have been taken away at any time by a change in that Constitution, without any violation of the National Constitution (*Hurtado* v. *California*, 110 U. S., 516; *Maxwell* v. *Dow*, 176 U. S., 581). It will not be pretended that this was the right violated by the statute which the Court declared to be void in *Callan* v. *Wilson*, or held not to be infringed by that interpreted in *Capital Traction Co.* v. *Hof*.

The right vindicated in those cases was one secured by a prohibition on the Government of the United States to punish anyone, within the limits of the country, for crime, except on conviction after trial by jury; or to determine civil cases except upon a like trial. If that right had depended upon residence in, or citizenship of, a State, it would have terminated, as did the right of suffrage, when the District was erected.

7.

Congress supreme in the Territories as to political, but not as to civil, rights.

But we are referred to another class of cases, supposed to conflict with the authorities directly in point, which we have cited, in that they lay down the principle of the absolute dominion of Congress over the territories. It is possible to excerpt, from the opinions rendered in the cases to which we al-

lude, general remarks of that nature, but—in most cases expressly, and in all cases by the nature of the subject under consideration—they will be found to refer to the claim of political rights, as distinguished from civil rights, by the inhabitants of the territories.

This distinction between civil and political rights, is one on which we cannot too earnestly insist. The former are secured negatively by the general prohibitions of the Constitution, to all persons whatsoever; the latter are conferred positively, by express provisions of the Constitution, upon a special class of persons only. The nature of both, and the distinction between them, cannot be more lucidly exposed than by referring to the opinion of Mr. Justice MATTHEWS in

Murphy v. *Ramsey*, 114 U. S., 15.

In that case the appellant claimed that an act of Congress, under which he had been deprived of the right to vote at an election in Utah by reason of his being a polygamist, was unconstitutional. The learned Judge who delivered the unanimous opinion of the Court, first considered whether the statute was open to the objection that it was an *ex post facto law* (p. 42); thus assuming that if it were of that nature it would be void. Finding, however, that it was not of that nature, he proceeded to consider whether it was within the constitutional power of Congress (p. 44):

> "The counsel for the appellants in argument
> " seem to question the constitutional power of
> " Congress to pass the act of March 22, 1882,
> " so far as it abridges the rights of electors in
> " the Territory under previous laws. But that
> " question is, we think, no longer open to dis-
> " cussion. It has passed beyond the stage of
> " controversy into final judgment. *The Peo-*

"*ple of the United States*, as sovereign owners "of the national Territories, *have supreme* "*power over them and their inhabitants.* In "the exercise of this sovereign dominion, they "are represented by the *government of the* "*United States*, to whom all the powers of "government over that subject have been "delegated, subject only *to such restrictions* "*as are expressed in the Constitution, or* "*are necessarily implied in its terms.* "or in the purposes and objects of the power "itself; for it may well be admitted in re- "spect to this, as to every power of society "over its members, that it is not ab- "solute and unlimited * * * The right "of local self-government, as known to our "system *as a constitutional franchise*, "belongs, under our Constitution, to the "States and *to the people thereof*, by whom "that Constitution was ordained, and to "whom by its terms all power not conferred "by it upon the *Government of the United* "*States* was expressly reserved. The *personal* "*and civil rights* of the inhabitants of the "Territories are secured to them, as to other "citizens, by the principles of constitutional "liberty which restrain all the agencies of "government, State and National: *their po-* "*litical rights are franchises* which they hold "as *privileges* in the legislative discretion of the "Congress of the United States. This doc- "trine was fully and forcibly declared by the "Chief Justice, delivering the opinion of the "Court in *National Bank* v. *County of Yank-* "*ton*, 101 U. S., 129. See also *American Ins.* "*Co.* v. *Canter*, 1 Pet., 511; *United States* v. "*Gratiot*, 14 Pet., 526; *Cross* v. *Harrison*, 16 "How., 164 *Dred Scott* v. *Sandford*, 19

> " How., 393. If we concede that this discre-
> " tion in Congress is limited by the obvious
> " purposes for which it was conferred, and
> " that those purposes are satisfied by measures
> " which prepare the people of the Territories
> " to become States in the Union, still the con-
> " clusion cannot be avoided, that the Act of
> " Congress here in question is clearly within
> " that jurisdiction."

It was immediately after quoting those words of MATTHEWS, J., in which he speaks of the power over the territories being subject to the express, and to the necessarily implied, restrictions of the Constitution, that Mr. Justice BRADLEY, in *Mormon Church* vs. *U. S.*, 136 U. S., p. 44, let fall the observation quoted in the opinion of the Court below (R. p. 33):

> " Doubtless Congress, in legislating for the
> " Territories, would be subject to those funda-
> " mental limitations in favor of personal rights
> " which are *formulated in the Constitution*
> " *and its amendments*, but these limitations
> " would exist rather by inference and the gen-
> " eral spirit of the Constitution from which
> " Congress derives all its powers, than by any
> " express and direct application of its provi-
> " sions."

It is undoubtedly true that the Constitution does not expressly and directly declare its prohibitions to apply to the power to govern the territory of the United States. More than this we do not presume, especially in view of the context, that the learned Judge can have intended to say. But if this remark can be twisted into an expression of a doubt favorable to the contention that " those fundamental limita-
" tions formulated in the Constitution," do not

affect Congress in the government of the territories, it would be enough to say, that any such doubt has been resolved in the later cases cited above. The remark made earlier in the same opinion, that "the power of Congress over the Territories of the United "States is general and plenary" (p. 42), evidently does not mean that it is unlimited, as is apparent from the passage quoted above.

So, again, in *Nat'l Bank* v. *County of Yankton*, where WAITE, C. J., had occasion broadly to express the power of Congress over the territories, he was speaking of its power over the territorial government which Congress had erected. The matter in dispute was the power of Congress to supersede an act of the Legislature of the Territory of Dakota. He said (p. 133):

> "Such a power is an incident of sovereignty, "and continues till granted away. Congress "may not only abrogate laws of the territorial "legislature, but it may itself legislate directly "for the local government. It may make a "void act of the territorial legislature valid, "or a valid act void. In other words, "IT HAS FULL AND COMPLETE LEGISLATIVE "AUTHORITY OVER THE PEOPLE OF THE TERRI-"TORIES and all the departments of the terri-"torial governments. It may do for the "Territories what the people, under the Con-"stitution of the United States, may do for the "States."

But this observation followed directly upon his saying:

> "Congress is supreme, and for the purposes "of this department of its governmental au-"thority has all the powers of the people of "the United States, EXCEPT SUCH AS HAVE "BEEN expressly or by implication RESERVED in "the prohibitions of the Constitution" (p. 133).

8.

THE CASES AS TO THE TERRITORIAL COURTS.

We are also referred to a series of cases, in which it has been held that certain provisions of the judiciary article of the Constitution do not apply to the establishment of Courts of justice in the territories by Congress.

This line of cases, which begins with *American Insurance Company* v. *Canter*, 1 Peters, 511, and includes *Benner* v. *Porter*, 9 How., 235; *Clinton* v. *Englebrecht*, 13 Wall., 434, and *McAllister* v. *U. S.*, 141 U. S., 174, does not, when read with the slightest degree of care, lend any support to the theory that the Constitution is not operative in the Territories. These cases hold, indeed, that the provisions applicable to "Courts of the United States," by which is meant those Courts in which the judicial power of the Government is vested (those Courts whose jurisdiction is limited to controversies arising under the laws of the United States; between citizens of different States, etc.), do not apply to Courts the main purpose of whose establishment is, the *general administration of justice* in the Territories. The reason is, not because the general provisions of the Constitution do not apply to the Territories, but because these particular provisions manifestly were not intended to apply to the Courts organized —not under the inappropriate constitutional provisions relating to the judiciary but,—under the general power of Congress to govern the Territories.

The question at issue in the *Canter* case was the validity of a decree of a Court of the Territory of Florida. By Act of Congress two Superior Courts were appointed for Florida, and the legislative council was authorized to establish inferior Courts,

having the same jurisdiction as to Superior Courts, except in capital cases and "except so far as made "exclusive in either by other provisions of the "statute" (p. 544). The Court in question was established under this grant of power.

The first question to be decided was, whether the jurisdiction conferred by Congress on the superior *and inferior* Courts embraced salvage cases. We shall have occasion later to consider that part of the opinion (542–544), which relates to this point. It is not material to our present purpose to do more than state that it was answered in the affirmative.

Another point to be determined by the Court was, whether the jurisdiction over salvage cases was "made exclusive" in the *Superior* Courts by another section of the Act. This point was decided in the negative (544–546).

The remaining question, the discussion of which covers less than an entire page (546) of the report, is the only one that concerns us now. The Chief Justice stated it as follows:

> "It has been contended that, by the Consti-
> "tution, the judicial power of the United
> "States extends to all cases of admiralty and
> "maritime jurisdiction, and that the whole of
> "this judicial power *must* be vested 'in one
> "'Supreme Court and in such inferior Courts
> "'as Congress shall from time to time ordain
> "'and establish.' Hence, it has been argued
> "that Congress cannot vest admiralty juris-
> "diction in Courts created by the territorial
> "legislature."

Now, how did Judge Marshall refute this argument? Not by the assertion that Congress could do what it pleased in the territories without regard to constitutional prohibitions, but by showing that

the Constitution had not prohibited Congress from conferring admiralty jurisdiction on territorial Courts:

> "We have only to pursue this subject one "step farther to perceive that this provision "of the Constitution does not apply to it. "The next sentence declares that 'the Judges, "both of the Supreme and inferior Courts, "shall hold their offices during good be- "havior.' The Judges of the Superior Courts "of Florida hold their offices for four years. "These Courts, then, are not Constitutional "Courts * * *."

Did the Chief Justice, then, intend to assert that they were *extra* constitutional, or *un*constitutional Courts, as might appear when the sentence, as it sometimes is, is quoted incompletely? Certainly not, for what he says is:

> "These Courts, then, are not Constitutional "Courts, *in which the judicial power con-* "*ferred by the Constitution on the general* "*government can be deposited. They are in-* "*capable of receiving it.* They are legislative "Courts, created in virtue of the general right "of sovereignty which exists in the govern- "ment, or in virtue of that clause which en- "ables Congress to make all needful rules and "regulations respecting the territory belong- "ing to the United States. The jurisdiction "with which they are invested is *not a part* "*of that judicial power which is defined* "*in the 3d article of the Constitution*, but is "conferred by Congress, in the execution of "those general powers which that body pos- "sesses over the territories of the United "States. Although admiralty jurisdiction can "be exercised in the States in those Courts

"only which are established in pursuance of "the 3d article of the Constitution, the same "limitation does not extend to the territories. "In legislating for them, Congress exercises "the combined powers of the general and of "a State government."

If it can be conceived that Judge Marshall intended to hold, that territorial Courts were not created by virtue of the Constitution, certainly it can not be conceived that he would have used language so inapt to express his meaning. His argument, as we understand it, depends upon the nature of the judicial department of the Government, which is constituted with a strictly limited jurisdiction—over cases arising under the Constitution and laws of the United States, suits between citizens of different States, etc., etc. (Art 3, § 2); intended to sit in the States, as well as elsewhere. and so established as to exclude the jurisdiction of the State Courts in matters properly of Federal cognizance, without interfering with the general administration of justice in the States by their own Courts, to which Judge MARSHALL assimilates the territorial Courts, which are established for that purpose *primarily*, and not for the exercise of the special "judicial "power which is defined in the 3d Article of the "Constitution."

And so in *Benner* v. *Porter*, 9 How., 242, it is not possible to find any support for the theory of congressional omnipotence in the territories, except by keeping out of view the nature of the question there at issue, and by segregating imperfect fragments of the opinion of the Court.

It was claimed in that case that a territorial Court of Florida had jurisdiction of a suit in admiralty, commenced a year after the admission of Florida as a State. The argument was that the ter-

ritorial government was not completely abrogated, inasmuch as "matters of exclusive federal jurisdic- "tion within the territory, which, under our sys- "tem, did not and could not pass under the State "authority, still remained; and that with it, to "that extent, and for the purposes of "federal jurisdiction, the territorial organi- "zation continued" (p. 243). The answer of the Court was, that Federal jurisdiction *in the States* could be lodged only in Courts constituted under the judiciary article of the Constitution, and NELSON, J., who delivered the opinion of the Court, showed, in very much the same manner as it was shown in the *Canter* case, that the territorial Court, whose jurisdiction was involved, was not one of those Courts. "They," said he, "are not or- "ganized under the Constitution;" meaning, of course, that they are not organized under the direct provision of the Constitution for the organization of the *Federal* Judiciary:

> "They are not organized under the Consti- "tution, nor subject to its complex distribu- "tion of the powers of government, as the "organic law; but are the creations, exclu- "sively, of the legislative department, and "subject to its supervision and control. "*Whether or not, there are provisions in* "*that instrument which extend to and act* "*upon these territorial governments, it is not* "*now material to examine.* We are speaking "here of those provisions that refer particu- "larly to *the distinction between Federal and* "*State jurisdiction.*"

Clinton v. *Englebrecht*, 13 Wall, 434, simply followed the *Canter* case, and *Benner* v. *Porter*, in the matter of the distinction which they draw between the federal judiciary and the territorial Courts established by Congress. The question was,

whether the trial Judge in a territorial Court in Utah, had erred in disregarding the mode of empanelling a jury prescribed by the territorial legislature, and adopting that prescribed by the Judiciary Act for the District and Circuit Court of the United States. The contention of the defendant in error was, that the Territorial Court was a District Court of the United States, and that the judiciary act applied to it.

CHASE, C. J., said (p. 447):

> "The Judges of the Supreme Court of the "Territory are appointed by the President "under the act of Congress, but this does not "make the Courts they are authorized to hold "Courts of the United States" (*Cit'g Am. Ins. Co.* v. *Canter and Benner* v. *Porter*, *supra*).

This remark is certainly startling if read without the context, but it is presently seen to import nothing but that these courts are not a part of the judicial department of the government—are not Federal Courts, such as exercise their jurisdiction within the States:

> "There is no Supreme Court of the United "States, nor is there any District Court of the "United States, *in the sense of the Constitu-* "*tion*, in the Territory of Utah. The judges "are not appointed for the same terms, *nor is* "*the jurisdiction which they exercise part of* "*the judicial power conferred by the Consti-* "*tution or* [on] *the General government.* The "courts are the legislative courts of the Terri- "tory, created in virtue of the clause which "authorizes Congress to make all needful "rules and regulations respecting the Terri- "tories belonging to the United States."

The meaning of the phrase, "Courts of the "United States" and the general nature of the subject discussed in the above cases, are well illustrated in

Hornbuckle v. *Toombs*, 18 Wall., 655.

This case was brought up by a writ of error to the Territory of Montana. The organic act contained the clause usually inserted in such acts since 1850, declaring that "the Constitution, and "all laws of the United States not locally inapplica- "ble, shall have the same force * * within said "Territory * * as *elsewhere in the United "States.*" The question was whether "all regula- "tions respecting judicial proceedings which are "contained in any of the acts of Congress, are im- "ported into the practice of the Territorial Courts." BRADLEY, J., said (p. 655):

> "The acts of Congress respecting proceed- "ings in the United States courts are con- "cerned with and confined to those courts, "considered as parts of the Federal system, "and as invested with the judicial power of "the United States expressly conferred by the "Constitution, and to be exercised in corre- "lation with the presence and jurisdiction of "the several State courts and governments. "They were not intended as exertions of that "plenary municipal authority which Congress "has over the District of Columbia and the "Territories of the United States. They do "not contain a word to indicate any such in- "tent. The fact that they require the Circuit "and District Courts to follow the practice "of the respective State courts in cases at law, "and that they supply no other rule in such "cases, shows that they cannot apply to the "Territorial courts. As before said, these acts

"have specific application to *the courts of the* "*United States, which are courts of a pecu-* "*liar character and jurisdiction.*"

And so CLIFFORD. J., said in

The City of Panama, 101 U. S.. 460:

"Courts of the kind, whether created by "an act of Congress or a territorial statute, "are not, *in strictness, Courts of the United* "*States*; or, in other words. the jurisdiction "with which they are invested is not a part of "the judicial power defined by *the third arti-* "*cle of the Constitution.*"

These observations of Judge CLIFFORD were quoted and approved by HARLAN, J., in the opinion of the majority of the Court in

McAllister v. *U. S.*, 141 U. S., 174.

In that case the authorities which we have cited, and other like cases, were collated, and their principle applied to the question whether the District Court for Alaska was "a Court of the United States" in the sense that a Judge of that Court was not liable to removal at the pleasure of the President. We find nothing said by the learned Judge, who was the author of the opinions in *Callan* v. *Wilson* and *Thompson* v. *Utah*. which conflicts with our understanding of the law laid down in those cases. The conclusion which he deduces from the earlier cases as to territorial Courts, is (p. 184), that

"These cases close all discussion here as to "whether territorial Courts are of the class "defined in the third article of the Constitu- "tion. It must be regarded as settled that "Courts in the Territories, created under the "*plenary municipal* authority that Congress

" possesses over the Territories of the United " States, are not Courts of the United States " created under the authority conferred *by that* " *article.*"

It is true that the learned Judge, after expressly declining to consider "*how far*" the exercise of the "*plenary* power of Congress over the territor- " ies" was "restrained by the essential principles " upon which our system of government rests, " and which are embodied in the Constitution" (p. 188), quoted the remark of BRADLEY, J., upon which we have commented above. But he quoted it as an assertion that such restriction, whatever its extent might be, did exist; and he was not considering the subject of *express* limitations, (for he had already held that there were none which affected the matter he was considering,) but the claim of the appellant "upon general principles, lying at the foundation of our institutions" (p. 187) that the term of judicial office during good behaviour was demanded by the *spirit* of the Third Article.

9.

ROSS'S CASE.

In re Ross, 140 U. S., 464, is also supposed to lend color to the theories of counsel for the Government. It was held in that case that a trial in our Consular Court in Japan for a murder committed within the territorial jurisdiction of that country, need not be by jury. But it was expressly on this ground that the case was decided: that the crime was not committed within the territorial jurisdiction of the United States, but in that of Japan; that *our Government* was ordained and established for the United States of America, and that *its authority* did not extend to

"countries outside of their limits;" and that the authority exercised by its officers in another country, must be exercised upon terms to which that other country consented. The authority exercised by the Consul was recognized as being delegated to him by Japan, under its treaty with our Government.

The conclusion of the Court was also reinforced by reference to the antiquity and universality of consular Courts, and to the consequence that the framers of the Constitution must have been fully aware of the necessity of having judicial authority exercised by our consuls in non-Christian countries (465) where it would be *impossible* to obtain "a competent grand or petit jury"; and it was said that "they must have known that such a requirement would defeat the main purpose of investing the consul with judicial authority" (p. 465); and that "the requirement * * would, "in a majority of cases, cause an abandonment of "all prosecution" (p. 464).

> FIELD, J.: "The Constitution can have no "operation in another country. When, there- "fore, the representatives or officers of our "government are permitted to exercise "authority of any kind in another country, it "must be on such conditions as the two coun- "tries may agree, the laws of neither one be- "ing obligatory upon the latter."

But even if the case did not depend upon the principles upon which it is thus expressly based, it would only show what we have no hesitation in admitting: that the broadest and most unqualified prohibition may embrace within its letter a case obviously repugnant to its spirit; and we cannot fairly contend that the spirit is to be sacri-

ficed to the letter in the construction of *any* provision of the Constitution. That prohibitive provision of the Constitution which is couched in the most universal and peremptory terms, the Thirteenth Amendment, was held by this Court not to apply to the recaption and forcible detainment of a sailor deserting from a merchant vessel. (*Whitney* v. *Robertson* 165 U. S. 274). But "the case being "within the words of the rule, must be within its "operation likewise, unless there be something in "the literal construction so *obviously absurd* or "*mischievous*, or *repugnant to the general spirit* "*of the instrument*, as to justify those who ex- "pound the Constitution in making it an excep- "tion" (per MARSHALL, C. J., in *Dartmouth College* v. *Woodward*, 4 Wheat., 644).

And it is only solemnly and reverentially that the suggestion of such an exception will so much as be entertained by "those who expound the Constitution," when they consider that these prohibitory clauses were deliberately inserted in "a Constitution intended to endure for ages to "come, and consequently, to be adapted to the "various crises of human affairs," by men who fully realized that "it could not be foreseen what "new changes and modifications of power might "be indispensable to effect the general object of "the charter," and that "*restrictions* and specifi- "cations, which at the time might seem salutary, "might, in the end, prove the overthrow of the "system itself" (MARSHALL, C. J., in *McCulloch* v. *Maryland*, 4 Wheat., 415; STORY, J., in *Martin* v. *Hunter's Lessee*, 1 Wheat, 304), and who nevertheless thought it right to establish a boundary not to be overstepped except upon renewed deliberation *by the People of the United States*.

The case, then, even had it been decided without regard to the delegation of power by Japan, would

only be in point if it were shown that constitutional government in new territory is obviously absurd, mischievous, repugnant to the general spirit of the Constitution.

10.

THE PRINCIPLES SETTLED BY THE CASES CITED, AND THEIR APPLICATION TO THE GOVERNMENT OF NEW TERRITORY.

These decisions view those provisions of the Constitution which they expound and uphold, not as bounded by any limits in their application to person, place, or time, but as intended always, everywhere, and for all. They embody the same principle so eloquently proclaimed by DAVIS, J., in *Ex parte Milligan*, 4 Wall, 120:

> "These securities for personal liberty thus "embodied, were such as wisdom and experi- "ence had demonstrated to be necessary for "the protection of those accused of crime. "And so strong was the sense of the country "of their importance, and so jealous were the "people that these rights, highly prized, might "be denied them by implication, that when "the original Constitution was proposed for "adoption it encountered severe opposition; "and, but for the belief that it would be so "amended as to embrace them, it would never "have been ratified.
>
> "Time has proven the discernment of our "ancestors; for even these provisions, ex- "pressed in such plain English words, that it "would seem the ingenuity of man could not "evade them, are *now*, after the lapse of more "than seventy years, sought to be avoided. "Those great and good men foresaw that

" troublous times would arise, when rulers and
" people would become restive under restraint,
" and seek by sharp and decisive measures to
" accomplish ends *deemed just and proper ;*
" and that the principles of constitutional lib-
" erty would be in peril, unless established by
" irrepealable law. The history of the world
" had taught them that what was done in the
" past might be attempted in the future. The
" Constitution of the United States is a law for
" rulers and people, equally in war and in
" peace, and covers with the shield of its pro-
" tection all classes of men, at all times, and
" under all circumstances."

Undoubtedly our fathers considered that the powers which they alienated by delegating them to the National Government were, by their very nature, incapable of infringing upon rights which they considered inalienable, and the gift of their Creator. Undoubtedly, too, they did not intend, in their delegation of power, to include the means of depriving them, or their posterity, or other men created equal with them in that they were similarly endowed, of the enjoyment of those rights in new regions, the addition of which to the national dominion, for the benefit of that posterity, we must assume that they contemplated. But they valued their rights so highly that they did not dare to leave them to rest upon mere inference ; those not originally asserted were embodied in the early amendments, the addition of which, to the Constitution, was a tacit condition of its ratification. They relied, not upon the spirit of their grant, but upon the " limitation and definition of power," which is the Constitution ; including, perhaps, in that limitation the reservation of certain rights not inalienable, but which they regarded as highly precious, and did not see fit to alienate ; and using

the same terms with reference to the inalienable and the unalienated.

It is, of course, true that the negative put by this Court, in the cases we have cited, upon an excessive claim of power, might have rested as well upon its inconsistency with the spirit, as with the letter, of the Constitution, but it was unnecessary, and would have been unnatural, to put it upon that ground, in view of the express prohibitions which stood in its way. It would be asking too much to complain that the Court did not anticipate a claim of power now made for the first time in the history of the Constitution; a claim of power so enormous, so far reaching, as to disdain such petty considerations as the application to it of this or that special Constitutional prohibition; and to extend to a general denial of all restrictions; to a general restriction of all constitutional restrictions within geographical boundaries which interpose no limit to the universal exercise of power elsewhere.

That this claim is utterly disproved by the letter of the Constitution, not only in its direct prohibitions and reservations, but also in those expressed by the form of its grant of power, we believe to be absolutely beyond question; but not more so than that it is utterly, and obviously, repugnant to the whole general spirit and purpose of constitutional government.

And it is easy further to prove that it is opposed to it, particularly in that it ignores the very purposes and objects to accomplish which the power to acquire new territory was conferred, by the Constitution, upon the National Government.

1. That the framers of the Constitution contemplated, or at least provided for, the acquisition by the United States of new and populated territory we do not deny; that they amply provided

against "the play and action of purely personal and arbitrary power" in such territory, as everywhere else, we believe we have proved; that they contemplated and provided for the acquisition of territory with a view to its permanent retention as a dependency, colony, or province has been denied by this Court on more than one occasion:

> "The Territories acquired by Congress, "whether by deed of cession from the original "States, or by treaty with a foreign country, "are held with the object, as soon as their "population and condition justify it, of being "admitted into the Union as States, upon an "equal footing with the original States in all "respects; and the title and dominion of the "tide waters and the lands under them are "held by the United States for the benefit of "the whole people, and, as the Court has "often said, in cases above cited 'in trust "for the future States'" (per GRAY, J., in *Shively* v. *Bowlby*, 152 U. S., 49).

And, as we have already seen, MCLEAN, J., in his dissenting opinion in the Dred Scott case (*ante*, p. 29), stated that the government of the Territories by Congress was "initiatory to the "establishment of State Governments.

So too, CURTIS, J., in the same case, after speaking of the "rules and regulations" clause, which he considered applicable to acquisitions by treaty, as "broad enough to extend throughout the ex- "istence of the government, and embrace all terri- "tory belonging to the United States throughout "all time, and *the purposes and objects of which* "*apply to all territory of the United States*" (p. 613) says (p. 615):

> "Since, then, this power was manifestly

"conferred to enable the United States to dis-
"pose of its public lands to settlers, and *to*
"*admit them into the Union as States* * * *
"I cannot doubt that this is a power to
"govern the inhabitants of the territory, by
"such laws as Congress deems needful, until
"they obtain admission as States."

And the *majority* of the Court were of the same opinion:

See per TANEY, C. J., 19 How, pp. 446–449.

This question, probably, can never arise directly in this Court. The duty of supporting the Constitution in this respect must rest with another branch of the Government. But, incidentally, the point is material here, for if the end in view is admission to the absolute equality of Statehood, it is contrary to the evident spirit and intention of the Constitution, as well as to its letter, that in the period of preparation for such equality, those for whom the highest and fullest political franchises are intended should—in the period during which they must be deprived, in part at least, of these—have no rights; but left to depend even for the ordinary and essential attributes of freemen, upon *any human discretion*.

2. And yet the same argument holds good even if we concede that the power of holding and governing permanent colonies was deliberately conferred by the People on the Government. If they considered that power as "an ordinary attribute of "sovereignty" proper to be transferred to the political system which they were establishing, it was because they did not contemplate—and they certainly were not accustomed to contemplate—a colony as "subject to purely personal and "arbitrary power." They themselves *as colo-*

nists had enjoyed rights and liberties of which they believed that they could not lawfully be deprived; many—perhaps most—of them, long hoped against hope that *as colonists* they might enjoy them again; it was to *defend* such existing rights, not to acquire new rights, that they had fought and bled; and the notion of a colony, as essentially subject to absolute and unlimited power, was as far from them as from Chatham, Camden or Burke; as far from their ideas, as that of endowing their future government with a franchise to exercise over other people the tyranny which they had just overthrown, was from their principles.

3. The force of this consideration is redoubled if we inquire into the *sole motives* which could have led to the grant to a government founded upon such principles as ours, of the power to acquire new territory, to be held as a permanent dependency.

It would be difficult to imagine such a power to have been given in order disinterestedly to confer upon a people, intended to remain separate and isolated from this Nation, and to continue to enjoy, not only their individual, but their common property, as their own, subject to no burdens or exactions except those necessary to secure to them a sufficiently stable and potent government—to confer on such a people the blessings of our government; and the supposition is absurd if those blessings be reduced by a full allowance of our opponents' claims.

It would be outrageous to suppose that such a power was given merely in order that we might hold the treasury of such a people and plunder it for our own advantage.

The only reasonable suggestion is that such dependencies were to be acquired for the use and benefit, in common with its original inhabitants, of "ourselves and our posterity"; as a new field in

which their energies in the peaceful pursuits of life might reap legitimate harvests.

But, if this be the supposition, how can we believe that such regions, to be inhabited, with others, by the very race, to secure to whom the blessings of liberty the Constitution was ordained, were to be deprived of those blessings?

The Constitution, with its limitations upon governmental power, either applies to all who inhabit our colonial possessions, or to none. If one of its native inhabitants can be prohibited from the free exercise of his religion, can be the subject of a bill of attainder, can be convicted of a crime without trial by jury, can be deprived of his property for public purposes without compensation, so can any American citizen, so can any descendant of Alexander Hamilton or of James Madison, who inhabits there.

And—to anticipate somewhat—if the Constitution does not provide any rules of numerical and geographical uniformity to protect such a region against unequal taxation, or taxation for the benefit of the National Government, the consequences must fall upon the one, as upon the other.

4. The fundamental principle of our institutions, which the PEOPLE OF THE UNITED STATES, as possessed of all the attributes of sovereignty, have the power to overturn, but which are otherwise indestructible, is that no government, however wise, however good, however dependent on the suffrages of the governed, can be safely entrusted with absolute and unlimited power anywhere; and whether the principle is wise or foolish, practical or sentimental, those who expound the Constitution cannot overlook the fact that this was the firm belief and the guiding principle of the People which ordained it.

11.

ON ANNEXATION, POLITICAL LAW NECESSARILY ALTERS, WHILE MUNICIPAL LAW CONTINUES IN FORCE.

We think it follows from the cases which we have cited, that constitutional prohibitions are the inseparable concomitants of constitutional powers; and if so, it must be true, for it is merely stating the same proposition in a different form, *that immediately upon the acquisition* of territory those prohibitions apply in governing it.

But let us consider the matter from the point of view which our opponents will probably adopt. It will be said, we suppose, that the laws of a country conquered and annexed continue in force until they are superseded by the new sovereign.

This is true, but only as to the municipal or local law which governs the relations of the inhabitants to each other; not as to the political law which governs their relations to "their new master." And it is certainly not true that the "new master" can only alter the law by legislation enacted *after* annexation. These limitations are apparent from the reason of the rule. The old law does not—to borrow our opponent's phrase—survive *ex proprio vigore;* it is not the continuing mandate of the old sovereign, but the *presumptive* mandate of the new.

> "The reason is, because though a conqueror
> "may make new laws, yet there is a necessity
> "that the former should be in force till new
> "are obtained."
>
> *Blankard* v. *Galdy*, 4 Mod., 222, 225.

The rule, therefore, is subject to serious limitations when the "new master" is represented by a constitutional government of limited powers.

The constitutional restrictions do not relate to local or municipal laws, but to the relations of the government to the governed. The laws governing these relations must depend upon the constitutional powers and limitations of the new government, not on those of the old.

Chicago &c. R'y Co. v. *McGlinn*, 114 U. S., 542, 546 :

FIELD, J. : "It is a general rule of public "law, *recognized and acted upon by the* "*United States*, that whenever political juris- "diction and legislative power over any terri- "tory transferred from one nation or "sovereign to another, the *municipal* laws of "the country, that is, laws which are intended "for the protection of private rights, continue "in force until abrogated or changed by the "new government or sovereign. By the cession "public property passes from one govern- "ment to the other, but private property "remains as before, and with it those "municipal laws which are designed to secure "its peaceful use and enjoyment. AS A MAT- "TER OF COURSE, ALL LAWS, ORDINANCES, "AND REGULATIONS IN CONFLICT WITH THE "POLITICAL CHARACTER, INSTITUTIONS, AND "CONSTITUTION OF THE NEW GOVERNMENT "ARE AT ONCE DISPLACED. Thus, upon a "cession of political jurisdiction and legisla- "tive power--and the latter is involved in the "former—to the United States, the laws of "the country in support of an established re- "ligion, or abridging the freedom of the press, "or authorizing cruel and unusual punish- "ments, and the like, would at once cease to "be of obligatory force without any declara- "tion to that effect; and the laws of the "country on other subjects would necessarily

" be superseded by existing laws of the new " government upon the same matters, But " with respect to other laws affecting the pos- " session, use and transfer of property, and " designed to secure good order and peace in " the community, and promote its health and " prosperity, which are *strictly of a municipal* " *character*, the rule is general, that a change " of government leaves them in force until, by " direct action of the new government, they are " altered or repealed. *American Insurance* " *Co.* v. *Canter*, 1 Pet., 542; Halleck, Inter- " national Law, ch. 34, § 14."

Halleck's Int. Law, c. xxxiii, § 14.

" ' The laws of a conquered country,' says " Lord Mansfield, 'continue in force until they " are altered by the conqueror; the absurd ex- " ception as to pagans, mentioned in Calvin's " case, shows the universality and antiquity of " the maxim. For that distinction could not " exist before the Christian era, and in all " probability arose from the mad enthusiasm " of the crusades.' This may be said of the " *municipal* laws of the conquered country, " but not of its political laws, or the relations " of the inhabitants with the government. The " rule is more correctly and clearly stated by " Chief Justice Marshall, as follows: 'On the " transfer of territory, it has never been held " that the relations of the inhabitants with " each other undergo any change. Their " relations with their former sovereign " are dissolved, and new relations are " created between them and the govern- " ment which has acquired their territory;— " the law, which may be denominated political, " is necessarily changed, although that which

"regulates the intercourse and general con-
"duct of individuals, remains in force until
"altered by the newly created power of the
"State.' This is now a well settled rule of the
"law of nations, and is universally admitted.
"Its provisions are clear and simple, and easily
"understood; but it is not so easy to distin-
"guish between what are *political* and what
"are *municipal* laws, and to determine *when*
"and *how far* the constitution and laws of
"the conqueror change or replace those of
"the conquered. And in case the government
"of the new state is a constitutional govern-
"ment, of limited and divided powers, ques-
"tions necessarily arise respecting the author-
"ity, which, in the absence of legislative ac-
"tion, can be exercised in the conquered terri-
"tory after the cessation of war, and the con-
"clusion of a treaty of peace. The determina-
"tion of these questions depends upon the in-
"stitutions and laws of the new sovereign,
"which, though conformable to the general
"rule of the law of nations, affect the con-
"struction and application of that rule to par-
"ticular cases."

See also

§§ 4, 13, 17, 19, 21 and 24, and cases cited.

So in *Pollard's Lessee* v. *Hagan*, 3 How., 225, it being claimed that the United States had the right to grant the soil under navigable waters in the State of Alabama as against theState, because that was a prerogative of the Spanish Crown and passed to the United States on the cession of the territory by treaty, the Court said, *per* McKINLEY, J.:

"If it were true, that the United States ac-
"quired the whole of Alabama from Spain, no

"such consequence would result as those con-
"tended for. It cannot be admitted that the
"King of Spain could, by treaty or other-
"wise, impart to the United States any of his
"royal prerogatives; and much less can it be
"admitted that they have capacity to receive
"or power to exercise them. Every nation
"acquiring territory, by treaty or otherwise,
"must hold it subject to the constitution and
"laws of its own government, and not accord-
"ing to those of the government ceding it.
"Vat. Law of Nations, b. 1, c. 19, s. 210, 244,
"245, and b. 2, c. 7, s. 80."

In *American Insurance Company* v. *Canter*, *supra*, one of the questions before the Court (see *ante*. p. 45) was whether a Territorial Court of Florida had jurisdiction of salvage cases under an Act of Congress which gave it jurisdiction over "all civil cases arising under and cognizable by "the laws of the territory now in force therein." It was successfully sought to support the jurisdiction of the Court on the ground that there was an existing law as to salvage, among "those "enacted by the Spanish Government" (p. 544). It was upon this point—upon a question of municipal law only, no constitntional question being involved—that MARSHALL, C. J., said, p. 542:

"The course which the argument has taken,
"will require, that, in deciding this question,
"the Court should take into view the relation
"in which Florida stands to the United
"States.

"The constitution confers absolutely on the
"government of the Union the powers of
"making war, and of making treaties; conse-
"quently, that government possesses the
"power of acquiring territory, either by con-
"quest or by treaty.

"The usage of the world is, if a nation be "not entirely subdued, to consider the hold- "ing of conquered territory as a mere military "occupation, until its fate shall be determined "at the treaty of peace. If it be ceded by "the treaty, the acquisition is confirmed, and "*the ceded territory becomes a part of the na-* "*tion to which it is annexed*, either on the "terms stipulated in the treaty of cession, or "on such as its new master shall impose. *On* "*such transfer of territory, it has never* "*been held, that the relations of the* "*inhabitants with each other undergo* "*any change.* Their relations with their "former sovereign are dissolved, and new re- "lations are created between them and the "government which has acquired their terri- "tory. The same Act which transfers their "country, transfers the allegiance of those "who remain in it; *and the law, which may* "*be denominated political, is necessarily* "*changed*, although that which regulates the "intercourse, and general conduct of indi- "viduals, remains in force, until altered by "the newly created power of the state.

"On the 2d of February, 1819, Spain ceded "Florida to the United States. The 6th article "of the treaty of cession contains the follow- "ing provisions: 'The inhabitants of the ter- "'ritories, which his Catholic majesty cedes "'to the United States by this treaty, shall be "'incorporated in the Union of the United "'States, as soon as may be consistent with "'the principles of the federal Constitution; "'and admitted to the enjoyment of the privi- "'leges, rights and immunities of the citizens "'of the United States.'

"This treaty is the law of the land, and ad- "mits the inhabitants of Florida to the enjoy

" ment of the privileges, rights, and immuni-
" ties, of the citizens of the United States. *It*
" *is unnecessary to inquire, whether this is*
" *not their condition, independent of stipula-*
" *tion.* They do not, however, participate in
" political power; they do not share in the
" government, till Florida shall become a
" state. In the meantime, Florida continues
" to be a territory of the United States; gov-
" erned by virtue of that clause in the Consti-
" tution, which empowers Congress 'to make
" all needful rules and regulations, respecting
" the territory, or other property belonging to
" the United States.'

" Perhaps the power of governing a territory
" belonging to the United States, which has
" not, by becoming a state, acquired the means
" of self-government, may result necessarily
" from the facts that it is not within the juris-
" diction of any particular state, and is within
" the power and jurisdiction of the United
" States. The right to govern, may be the in-
" evitable consequence of the right to acquire
" territory. Whichever may be the source,
" whence the power is derived, the possession
" of it is unquestioned."

We have quoted thus extensively from the opinion, because the whole passage bears, more or less directly, upon the subject-matter of this brief. Our immediate purpose, however, is with those passages which point out the distinction between " the law political " and " the law municipal." It was to the *latter* that the case related, and to it only, as we believe, that the Chief Justice referred when he spoke of the annexation as being " on the terms stipulated in the treaty, or on such as its new master may impose ; " as is shown by his immediately adding that the relations of the inhabitants

with each other undergo no change. But who is the new master? The United States, or the government of the United States? If the former, the terms which it "may impose," may exist as well in the preordained mandate of that master, as in subsequent legislation on its behalf; and, if the latter, Judge MARSHALL did not have occasion to consider *what terms* it *could* impose, and certainly did not say, or imply, that in imposing them it was subject to no limitations.

Cross v. *Harrison*, 16 How., 164, is also in point, but we postpone its consideration to a later portion of our brief, where we shall have occasion to consider it in detail.

We conclude, then, that the Constitutional prohibitions went into effect in Port Rico at the same time with the Constitutional powers of civil government to which they related; for we have conceded, and it is evident, that they do not relate to the war power. At what moment was this? It was, as MARSHALL, C. J., says in the *Canter* case, when "the holding of the conquered territory as a mere "military occupation" ceased. At the moment, that is, of the "transfer of territory" by the treaty, upon which "the ceded territory became a "part of the nation to which it was annexed."

If we have established this, we have, as we suggested before, disproved the proposition of the learned Judge below, that it required affirmative action, by Treaty or Act of Congress, to "extend "our organic law" to Porto Rico, and that until such action, its "status as a foreign country so far "as its internal relation to us is concerned" was preserved; and we need hardly stop to inquire whether "the power to hold territory without in- "corporating it as an integral part under its organic "law is an ordinary attribute of sovereignty," for if it be so, then we are considering one of the aspects in which sovereignty has especially been reserved

to the people of the United States, whose absolute and unlimited sovereignty, no one will presume to deny.

II.

The Treaty of Paris is not open to the construction that it provides for the governing of Porto Rico without regard to constitutional limitations, and as a country foreign to the United States. If it were possible to place that construction upon the Treaty, the provision would be void, as contrary to the Constitution, but this would not in any way prevent or affect the accomplishment or the usual results of annexation.

1.

Construction of the Treaty.

The construction put upon the treaty by the learned Judge below, depends entirely upon the single phrase in Article IX:

"The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress."

This provision must, if possible, be given a construction which will consist with the Constitution, and also one which will consist with its insertion in a treaty between two nations. A construction, then, which would imply an attempt

to deprive the inhabitants of rights, to which, under our Constitution, they must be entitled as soon as they pass under our dominion, must be avoided; and so must a construction, which would refer to matters in which *both* parties to the treaty *are not concerned*.

If Spain is not concerned in this provision of the treaty it is not in any sense a part of the treaty; it is merely a *lex pro se introducta;* a legislative act in disguise, made by a branch of the Government not authorized to make such laws, and, therefore, of no effect, whether it be a mere declaration of the powers of Congress as they are, or an attempt to enlarge them. Such a construction must also, of course, be avoided, if possible.

The *first* difficulty to which we alluded above may be overcome, by construing the provision as merely meaning that Congress shall determine what privileges, in addition to those which accrue by the mere cession, it will confer on the inhabitants. This declaration is absolutely consistent with the Constitution. It is also consistent with the letter of the clause, which certainly does not demand that Congress shall, or even expressly provide that it may, *deprive* the inhabitants of any rights.

But how is Spain concerned in such a provision?

If she *is* concerned in it, it is either a grant on her part, or a promise to her to be performed by the other party to the treaty, or a renunciation on her part of some right which she might otherwise be supposed to reserve. We will examine it in each of these aspects:

1. As a grant by Spain, the provision is absurd on its face. It will certainly not be pretended that the powers of Congress can be enlarged by a foreign power.

2. As a promise on the part of the United States,

the provision is a nullity. It promises nothing. Congress is to *determine*, but it may determine what it pleases, or nothing if it pleases. Its mere failure to determine, would be equivalent to a determination that the rights in question should remain as they were.

3. Our remaining difficulty is removed if we consider the provision in question as an express renunciation by Spain—except as otherwise provided in the treaty—of any pretension to secure a guarantee in favor of the civil or political privileges of the inhabitants of the territory which she ceded.

The treaty, excepting as to *native Spaniards*, and except for the meagre reservation as to property and religion in Arts. VIII and X, is entirely devoid of those provisions otherwise universal in treaties between civilized nations (*U. S.* v. *Percheman*, 7 Peters, 51) by which a sovereign discharges its final duty to those over whom it ceases to rule by means of *a direct guarantee to itself, of a violation of which it would, under international law, be entitled to complain.* It is not surprising that if the inhabitants were to be left without such protection—although in a cession to our country we may boast that it is unnecessary—it should have been thought expedient to avoid by unmistakable language the possible implication of such an ordinary stipulation.

This construction, then, is reasonable, and is the only one consistent with the nature of the instrument in which it occurs, and with the powers of the constitutional agents through whom the United States acted as a party to it.

2.

ANY UNCONSTITUTIONAL PROVISIONS IN THE TREATY ARE VOID.

1. As we have already seen, a treaty, in the view of

our American jurisprudence, is a mere law, and of no higher authority than any other law. An act of Congress and a treaty stand upon so precisely the same footing, that a law of either kind may repeal one of the other kind (*see cases cited supra, p.* 38). The Constitution, treaties, and acts of Congress, make up "the law of the land." But in case of conflict, one must be supreme over the others, and that one is the Constitution. The argument upon which it would be predicated that it is not the duty of the Court to support the Constitution against a treaty which conflicted with it, must be precisely the same by which, early in the history of this Court, it was sought to prove the same of an Act of Congress, and certainly no one who so much as dips his foot in the resistless current of reasoning which overwhelmed the advocates of that doctrine will venture further in.

Marbury v. *Madison*, 1 Cr., 176–180.

2. It has never yet become necessary for the Courts to declare a treaty or any provision of a treaty, to be unconstitutional. But more than once, in discussing the nature of treaties, as a part of the "law of the land," they have had occasion to state the limitations upon the treaty-making power.

Geofroy v. *Riggs*, 133 U. S., 258, 271.

FIELD, J.: "The treaty power, as expressed "in the Constitution, is in terms unlimited "EXCEPT BY THOSE RESTRAINTS WHICH ARE "FOUND IN THAT INSTRUMENT AGAINST THE "ACTION OF THE GOVERNMENT OR OF ITS "DEPARTMENTS, and those arising from the "nature of the government itself and of that of "the States. IT WOULD NOT BE CONTENDED "THAT IT EXTENDS SO FAR AS TO AUTHORIZE "WHAT THE CONSTITUTION FORBIDS, or a

"change in the character of the government "or in that of one of the States, or a cession "of any portion of the territory of the latter, "without its consent."

Doe v. *Braden*, 16 How., 657.

TANEY, C. J.: "The treaty is therefore a law "made by the proper authority, and the courts "of justice have no right to annul or disre- "gard any of its provisions, unless THEY VIO- "LATE THE CONSTITUTION OF THE UNITED "STATES."

New Orleans v. *United States*, 10 Peters, 736.

MCLEAN, J.: "The Government of the "United States, as was well observed in the "argument, is one of limited powers. It can "exercise authority over no subjects, except "those which have been delegated to it. Con- "gress cannot, by legislation, enlarge the fed- "eral jurisdiction, NOR CAN IT BE ENLARGED "UNDER THE TREATY MAKING POWER."

See, also,

Pollard's Lessee v. *Hagan*, 3 How., 225, *per* MCKINLEY, J.; quoted *supra* at p. 65.

These citations seem to us to put it beyond question, that the power to make treaties, like the power to regulate commerce or any other express power (*supra*, p. 16), can be exercised only with regard to the general prohibitory clauses of the Constitution. We are not, however, required by the exigencies of this case to push the doctrine to that extent; for we have seen that Article IX of the Treaty of Paris does not conflict with the Constitution unless it be interpreted, not as a part of an adjustment of differences between our own and

another nation, but as an attempt at an unconstitutional delegation of unconstitutional power, by the treaty making to the legislative branch of the government.

3.

ANNEXATION NOT AFFECTED BY UNCONSTITUTIONALITY OF PART OR WHOLE OF TREATY.

The learned Judge below would seem to have fallen into a grave error when he asserted (R., p. 31), "if the treaty must be declared unconstitu-"tional, Porto Rico remains a foreign country." That error seems to us to consist in the assumption that the efficiency of the annexation depends on the validity of the stipulations of the treaty, and that Article IX is a promise by the United States to Spain. But it is too plain for dispute, that the judicial branch of the Government is bound by the *mere fact of annexation*; and annexation may become a fact accomplished, without any treaty at all, as in the case suggested by MARSHALL, J., in the *Canter* case, where the conquered nation is "entirely subdued." That the will of the government, to effect the annexation, is expressed by the making of a treaty, is merely accidental, and does not in any way affect the nature of the act. And if there be stipulations in a treaty which the Government of the United States cannot perform, the matter is one for adjustment by that branch of the government which is charged with our international relations.

The relinquishment of sovereignty by the former possessor is certainly not indispensable, as the free act of an owner of real estate is to the transfer of the title. Annexation is accomplished when the conqueror secures firm possession and declares his will to treat such possession as permanent. And

if that conqueror is the United States, neither its will, expressed through its constitutionally delegated agents, nor the result of its expression, are the subject of question by the judicial branch of its government.

Foster v. *Neilson*, 2 Pet., 253, 309;
Jones v. *U. S.*, 137 U. S., 202.

In the case last cited this Court said (per GRAY, J., p. 212):

> "Who is the soverign, *de jure* or *de facto*, "of a territory is not a judicial but a political "question, the determination of which by the "legislative and executive departments of any "government conclusively binds the judges, as "well as other officers, citizens and subjects "of that government. This principle has "always been applied by this Court, and has "been affirmed under a great variety of cir- "cumstances."

The constitutional question which we raise, however, is not one which depends in any way upon the means by which the annexation was brought about. It assumes, and is based upon, the accomplished fact of annexation, and relates only to the power of the government over the territory annexed. The former is a political, the latter a judicial question.

III.

If the Tariff Act imposes a duty or tax upon goods brought from Porto Rico to a place elsewhere in the United States after the annexation, the imposition is void as being in conflict with an express provision of the Constitution.

1.

"THROUGHOUT THE UNITED STATES."

The power conferred upon Congress, by Section 8 of Article I of the Constitution, to "lay and collect Taxes, Duties, Imposts and Excises" is immediately limited in these words:

> "BUT all Duties, Imposts and Excises shall "be uniform THROUGHOUT THE UNITED "STATES."

What is the meaning of the three words, "the United States"? That, we take it, is the only question to be discussed; for it has not yet been, and will not, we presume, be denied, that the imposition of a duty, or excise, *only* on goods brought from one or more specified States of the Union, or specified places therein, to other places within the limits of the States (as distinguished from the Territories), would violate this provision of the Constitution. In other words, the question is whether the words "the United States," which are undoubtedly used here in a geographical sense (*Knowlton* v. *Moore*, 178 U. S., 41), indicate the complete territorial limits over which the government of that entity known also in the Constitution as "the United States Extends," or only that part of them which is also included in the limits of the several States which are under the Constitution.

2.

LOUGHBOROUGH *v.* BLAKE.

In *Loughborough* v. *Blake*, 5 Wheat,, 317, this precise question was as squarely decided as any that ever arose in a Court of law, and it was so decided by a Court as imposing in authority as any which ever passed upon a constitutional question.

The subject under consideration was the right of the Congress to include the District of Columbia in the imposition of a general direct tax. Counsel for plaintiff, while admitting that under another grant of power Congress had authority to lay a special direct tax on the District *for local purposes*, claimed that, so far at least as direct taxes were concerned, the grant of power to lay and collect taxes under § 8 of Article I, did not extend to the District, because it was limited by the provision in § 2 of the same article, that "representatives and "*direct taxes* shall be apportioned among the "several States which may be included in this "Union, according to their respective numbers," and by the provision in § 9 that "no capitation or "direct tax shall be laid unless in proportion to "the census," which the Constitution directs to be taken (Art. I, § 2), of the inhabitants of the several States. Both of these provisions, counsel claimed, were evidently inapplicable except to the States.

Chief Justice MARSHALL'S first step towards refuting this argument, was to prove that the grant of power extended "to all places over which the government extends," with a view to the next step, which was that an exception to an express grant will only be found in equally express terms ("The "power having been expressly granted, the excep- "tion would have been expressly made," p. 320).

Now the crucial test of the express and general nature of the grant was found by Judge MARSHALL in the very provision which we are considering, *i. e.*, the words, "but all duties, imposts and excises shall be uniform *throughout the United States*":

> "It will not be contended, that the *modifi-*
> "*cation* of the power extends to places to
> "which the *power itself* does not extend.
> "The power, then, to lay and collect duties,
> "imposts and excises may be exercised, and
> "*must* be exercised, *throughout the United*
> "*States*. Does this term designate the whole,
> "or any portion of THE AMERICAN EMPIRE?
> "Certainly, this question can admit of but
> "one answer. It is the name given to our great
> "republic, which is composed of states *and ter-*
> "*ritories*. The District of Columbia, or the ter-
> "ritory west of the Missouri, is not less within
> "the United States, than Maryland or Pennsyl-
> "vania; and it is not less necessary, on the
> "principles of our constitution, that uniform-
> "ity in the imposition of imposts, duties and
> "excises should be observed in the one, than
> "in the other. *Since, then, the power to lay*
> "*and collect taxes*, which includes direct
> "taxes, *is obviously co-extensive with the*
> "*power to lay and collect duties, imposts*
> "*and excises, and since the latter extends*
> "*throughout the United States*, IT FOLLOWS
> "that the power to impose direct taxes also
> "extends throughout the United States" (p.
> 319).

Thus the proposition that the words "throughout the United States" designated the whole of "the AMERICAN EMPIRE," was a link in the chain of reasoning by which the conclusion was reached that the tax under consideration was valid.

If any statement of law, no matter how material a step it be in the chain of reasoning leading to the decision of a case, is to be considered a dictum because the same conclusion might be reached by a different argument, this may be a dictum; otherwise not; but, if so, no decision is an authority if it can be supported upon two grounds.

We rely upon this case, then, as upon an authority directly in point; but, it remains, in the light which the comprehensive but concise opinion of Judge MARSHALL affords, to amplify the argument upon which his decision rests, and to consider more minutely, both the letter of the Constitution, and the principles to which the Chief Justice adverts as making necessary the construction which he puts upon it.

3.

THE PRINCIPLES OF THE UNIFORMITY PROVISION.

Up to this point of our argument it has been our object to prove, that Porto Rico is a part of the United States, not only in that the land had been added to the former territorial possessions of the Nation, but in that as a necessary consequence of such additions, its inhabitants and those within our former limits are under a common government, exercising authority everywhere by a single delegation of powers, and subject everywhere not only to the same inherent restrictions but to certain express prohibitions, which being imposed in general and comprehensive terms, are *everywhere* restrictive of any exercise of power conflicting with them, and which, being based upon universal principals of right and justice,—according to the notions of right and justice, at least, of those who framed them,—must have been intended to be of universal operation.

It remains to be considered, whether the particular prohibition which this appellant seeks to interpose between himself and the action of the government, is, in its letter and by its spirit, to be placed in the same category.

We assert that it is; that in its terms it is as general and comprehensive a prohibition as those with which we have hitherto dealt, and that among its purposes was that of securing every portion of the territory over which the most formidable power of the Government—the power to tax—extended, from a partial and oppressive exercise of that power, so far as such security was compatible with the necessities of the case; and those necessities did not require any discrimination between the States and the Territories.

And furthermore, we assert that the history of its origin shows that peculiar motives existed to urge the framers of the Constitution to restrict the power of taxation wherever exercised, even if the demands of justice and right had not appealed to them to apply the other prohibitions of the Constitution beyond the limit of the States themselves.

And first, as to the spirit of the instrument. In the absence of any causes arising from local jealousy and mistrust, what, if any, restrictions upon the "power of the purse," should we expect, from our knowledge of their motives and desires, to find the People of the United States imposing upon their Government?

Before answering this question we must be permitted to say, at the risk of repetition, that we distinctly recognize and unhesitatingly admit that the question of the territories, and their inhabitants, was undoubtedly a matter of secondary importance in the minds of the members of the Federal Convention, and that the immediate, pressing, and personal necessity was for a more perfect Union which would

"provide for the common defense and promote the general welfare" of those who then stood directly in need of it; that is, of themselves, the people of the several States, who composed the people of the United States. We insist, however, that it would be contrary to the elementary canons of constitutional construction, as well as to historical truth, to assume that our fathers looked no further than this, and either to forget that "the instrument was not intended to provide merely for the "exigencies of a few years, but was to endure "through a long lapse of ages" (*per* STORY, J., 1 Wh., 304), or to assume that those who ordained it failed to take into account the future growth and importance, not to say the very existence, of the immense tracts of fertile country then belonging to the Nation, and the certainty that it would derive its population from "themselves and their posterity" (see *per* CURTIS, J., in *Dred Scott* v. *Sandford*, 19 How., 605-612), and rise in due course to the absolute equality of statehood.

Taking these matters into consideration, we say, then, that in such an instrument we should expect, *a priori*, not only to find, as we unquestionably do find, such limitations upon that most dreaded power of taxation as might be practicable and consistent with its main purpose to ensure the equal distribution of the burden imposed for a common benefit upon the States which were the primary object of consideration, but to find the same protection extended wherever that burden might be imposed; that is to say, throughout the whole length and breadth of the land.

And this expectation would be strengthened by the recollection that a guaranty of such protection had just been granted by the Confederation to the few and scattered inhabitants of those parts of the United States which were not within any of the States (*North-West Ordinance, Art. IV*).

But what was the peculiar form of oppression in the exercise of the taxing power, to be feared and guarded against?

Not that which would lay a heavier hand upon one class in the community than upon another; our fathers had not experienced it, and, under a representative government, had little reason to dread it.

It was not this, but the danger of an unjust inequality in the distribution of the burden between the different parts of the country, that they had occasion to dread, and it is accordingly against inequality of *this* sort that we should expect them to provide, upon general principles of right and justice, and in the absence of any special fears or jealousies leading them to do so. That these general considerations entered into their motives we cannot doubt; nor can we doubt that they intended that the extent of the protection should coincide with the extent of the power; that the people of the territory of the United States should enjoy it, as well as the people of the States.

But there was, as we have said, a special and pressing cause, in which these general considerations were concentrated, for guarding against local discrimination, especially in *indirect* taxation. It is so well known; it crops out so constantly in every page of constitutional history; that we need hardly do more than allude to it. It lay in the fears and jealousies entertained by the smaller states towards the larger; those fears and jealousies which so nearly strangled our infant Nation in the cradle.

"Unless duties, imports, and excises were
"uniform, the grossest and most oppressive
"inequalities, vitally affecting the pursuits
"and employments of the people of different
"states, might exist. The agriculture, com-

"merce or manufactures of one State "might be built up on the ruins of "those of another; *and a combination "of a few States* in Congress might secure "a monopoly of certain branches of trade and "business to themselves, to the injury, if not "to the destruction, of their less favored "neighbors. The Constitution, throughout "all its provisions, is an instrument of checks "and restraints, as well as of powers. It does "not rely on confidence in the general govern- "ment to preserve the interests of all the "States. It is founded in a wholesome and "strenuous jealousy, which, foreseeing the "possibility of mischief, guards with solici- "tude against any exercise of power which "may endanger the States, as far as it is prac- "ticable. If this provision as to uniformity "of duties had been omitted, although the "power might never have been abused to the "injury of the feebler States of the Union (a "presumption which history does not justify "us in deeming quite safe or certain), yet it "would, of itself, have been sufficient to "demolish, in a practical sense, the value of "most of the other restrictive clauses in the "Constitution. New York and Pennsylvania "might, by an easy combination with the "Southern States, have destroyed the whole "navigation of New England. A combination "of a different character, between the New "England and the *Western States*, might "have borne down the agriculture of the "South; and a combination of a yet different "character might have struck at the vital in- "terests of manufactures."

Story on the Constitution, § 957.

Unless, in speaking of "the Western States," the

learned commentator had in mind the States to be formed out of the Northwest Territory, he was dwelling, in this passage, on that which, as we have already conceded, was undoubtedly most prominent in the minds of the framers of the Constitution; that is, the need to guard against the exercise of the taxing power by States over States; but we must continue to insist, that there is no reason for supposing that they did not generalize, both their fears, and their precautions against them.

In this special instance, indeed the motives by which they were influenced applied distinctly to the regions not then within the States. The concerted action of which Judge STORY speaks, would be the more crushing in its effects if the hostile combination of States of which he speaks could throw into the scale, against the objects of their hostility, the weight of an unequal competition in the Territories. And such concerted action was no more to be dreaded in any other shape, than, for instance, in the building up the North West Territory, through unequal taxation, at the expense of its agricultural competitors in the South; and it might in that shape, as well as in others, commend itself to the interests of the manufacturing States. And the same is true of the other illustrations suggested by Judge STORY.

4.

GEOGRAPHICAL UNIFORMITY.

The desired protection, then, was against local discrimination, not against class discrimination, and that protection against the taxing power we find that the Constitution affords, against direct taxation, by the rule of apportionment; against indirect taxation, where the danger was most imminent, by the rule of *geographical uniformity*.

That the uniformity required by the clause of the Constitution with which we are directly concerned, is of this character, has recently been decided by this Court.

Knowlton v. *Moore*, 178 U. S. 41.

The Court did not have occasion, in that case, to consider the question directly presented in that at bar. No point there arose, or was even suggested, as to whether the power of indirect taxation was to be exercised in the territory of the United States as well as within the States, and, so exercised, was to be subjected to the same restrictions there as elsewhere. But the necessities of the case prompted the learned Judge who delivered the opinion of the Court to a careful and exhaustive review of the situation and needs of the time when the Constitution was adopted, and of the debates upon the subject of taxation in the Continental Congress and in the Federal Convention. Neither in the facts collected, nor in the conclusions drawn from them, do we find anything but what supports the general statement of principles which we have undertaken to make. It has been our task, however, to show, if we could, that those principles have an extended application to which the attention of the Court was not then directed.

The debates in the Continental Congress, for instance, "make it clear that the words 'uniform "throughout the United States' which were "afterward inserted in the Constitution of the "United States, had, prior to its adoption, been "frequently used, and always with reference "purely to a geographical uniformity and as "synonymous with the expression 'to operate "generally throughout the United States'" (p. 96) but it does not of course follow that when the expression was used in the Constitution, the words

"United States" had precisely the same meaning as at the time of the debate in the Continental Congress. In that time, indeed, there was nothing *but States* to be taxed, and the expression was used indiscriminately, without regard to whether the taxes under consideration should be collected by the Confederation or by the States themselves.

And so when the learned Judge deduces from his review of the history of the clause in question in the Constitutional Convention, that the prominent end in view was the necessity to protect the States against inequality of taxation, we see no reason for supposing that he intended to intimate any denial that wider motives may have been at work, and wider results intended, or at least secured, in the framing of the clause. An inconsistent motive, or result, cannot, of course, be assumed; but that which we suggest is not only consistent with, but consequent upon, the central and primary purpose which he finds in it.

When, therefore, he concludes that the provision in Art. I, § 7, subd. 6, as to preferences between ports, and that regarding uniformity of duties, imposts and excises "were one in purpose, one in their adoption" (p. 105) he did not, we suppose, intend to suggest, much less to decide, that the latter might not have a broader scope and intention than, having in view the exclusively inland character of the territorial possessions of the United States, it was thought necessary to give to the other. The general result of the learned Judge's inquiry, is merely, to state it in his own words (p. 106), that "the words 'uniform throughout the "United States' do not signify an intrinsic but "simply a geographical uniformity."

5.

THE RULE OF APPORTIONMENT IN THE TERRITORIES.

The principles which we have suggested, then, are those to which, as we believe, Chief Justice MARSHALL alluded when he said that uniformity in indirect taxation was "not less necessary, on the principles of the Constitution," in the territories than in the States. But our conclusion as to indirect taxation will be strengthened if we find, that the principle of limiting the power to tax in the territories was recognized in the instance of *direct* taxation also.

This point also is *decided* in *Loughborough* v. *Blake*. We need not enlarge this brief by repeating the reasoning by which the Chief Justice reaches his result (5 Wheat., pp. 320–325); it will be enough to quote his general conclusion (325):

> "If it be said that the principle of uniformity, established in the constitution, secures the district from oppression in the imposition of indirect taxes, it is not less true, that the principle of apportionment, also established in the constitution, secures the district from any oppressive exercise of the power to lay and collect direct taxes."

6

MEANING OF THE WORDS "UNITED STATES" AS USED IN THE CONSTITUTION.

We now revert from the principles and spirit of the Constitution to its letter, in examining which, if our premises thus far are sound, we should be entitled to cast the burden of proof upon those who assert that the words "throughout the United States" do not refer to "our great Republic, which is com-

posed of States and Territories," but merely to the States included in it; but we shall find it easy to sustain the affirmative upon that question, and to show, by an examination of the Constitution itself, as well as by contrasting it with the Articles of Confederation, that the words "United States" are, in it, constantly used in the former sense. In various senses they are used, of course, but we may safely assert that their use is always compatible with—and only with—the idea of a *single, indivisible thing;* generally a political unity, as when they are used to personify the nation, or the government; sometimes a geographical unity, as in the clause under consideration and others to which we shall call attention; but always an unity. And we shall find, moreover, that when a term is needed to avoid an enumeration of the States whose "people"—not they themselves as bodies politic—formed a more perfect Union by ordaining and establishing the Constitution, a less curt but more apt expression is at hand for the purpose.

We cannot obtain much light upon the meaning of the term "United States" by reference to its use in the period of the Continental Congress. By the Articles of Federation thirteen separate and independent States associated themselves together for very limited purposes; and while the "style of this Confederacy" was "The United States of America," their separate sovereignty and independence of each other were in constant view (Arts. 2, 3). "America" had not yet "chosen to be a nation." At that time, too, and at that of the debates in the Congress on the subject of taxation, the words, used in their broadest geographical sense, included no territory which did not belong to, or was not claimed by, one or other of the States. No strong inference can be drawn then—to take one example—from the use of the term in the Treaty of Peace (Tr. & Conv. 376, Art. II) as signifying the entire

territory, the rights of "His Britannic Majesty" over which were relinquished, any more than from its use in Article I, as signifying the thirteen enumerated States which formed the Federation; or from the examples, taken by themselves, of its use in the Articles of Confederation presently to be mentioned.

But the use of the term in the Articles of Confederation as the equivalent of "the States United," while not significant in itself, lends great significance to the avoidance of a similar use in the Constitution itself. A striking instance is found in the provisions of the two instruments for the extradition of criminals, that in the latter being evidently a recasting of that in the former:

Arts. of Conf'n, Art. 4.	Const. U. S., Art. IV., § 2, Subd. 2.
If any *person*, guilty of, or *charged with, treason, felony or other* high misdemeanor, *in any State, shall flee from justice, and be found in* ANY OF THE UNITED STATES, he *shall*, upon *demand of the* governor or *executive* power *of the State from which he fled, be delivered up, and removed to the State having jurisdiction of* his offense.	A *person charged in any State with treason, felony or other* crime who *shall flee from justice and be found in* ANOTHER STATE, *shall*, on *demand of the executive* authority *of the State from which he fled, be delivered up*, to be *removed to the State having jurisdiction of* the crime.

So too, we frequently find in the Articles of Confederation such expressions as "the United States, or either of them" (*l. 12 of Art. 4, at 1 Ell. Deb., p. 79 (2d Ed., 1896)*; "the United States, or any "of them" (*l. 5 of Art. 6, id. 80*); "the United

"States in Congress Assembled, or any of them" (ibid., l. 7); "throughout *all the* United States" (Art. 9, id. 82, l. 47); "the United States, or any "of them" (id. 83, l. 37), and "a majority of the "United States in Congress assembled" (ibid. l. 43). And the phrase "the United States in Con- "gress Assembled" is constantly recurring. In all these cases "the United States" is used as a substitute for the enumeration of the thirteen States which were united.

In the Constitution, however, we find that idea expressed in quite different words. Representatives and direct taxes are not to be apportioned among the United States, but "among the several States "which may be included within this Union" (Art. I, § 2, subd. 3). "Nothing in this Constitution "shall be so construed as to prejudice any claims "of the United States or"—not "of any of "them"—but "of any particular State" (Art. IV, § 3, subd. 2). It is not all officers of the United States, or any of them, but those "both of the "United States and of the several States," who are required to "be bound to support this Constitu- "tion" (Art. VI, Subd. 3).

We find a single instance in the original Constitution of a relapse into the form of expression so common in the Articles of Confederation, in the provision of Art. II, § 1, subd. 7, that "the Presi- "dent * * shall not receive * * any other "emolument from the United States, or any of "them"; but that provision was interpolated, after the second draft had been submitted, on motion of Dr. Franklin and Mr. Rutledge, and in their own words. (Mad. Jour. Conv., Sept. 15, 1787, p. 734)

With this single exception we do not find an instance in the whole Constitution, in which the expression "the United States" occurs fifty-two times, where the words "The American Republic" could

not be substituted without varying the sense in any degree.

Of the use or the word "United States," in a geographical sense, we find but three instances besides that in question:

> "The Congress shall have power * * * to "establish an uniform rule of naturalization, "and uniform laws on the subject of bank- "ruptcies, throughout the United States."
>
> Art. I, § 8, subd. 4.

> "* * * Neither shall any person be eligi- "gible" to the office of President "who shall "not have been * * * fourteen years a resi- "dent within the United States."
>
> Art. II, § 1, subd. 5.

> "The Congress may determine the time of "choosing the Electors, and the day on which "they shall give their votes; which day shall "be the same throughout the United States."
>
> Art. II, § 1, subd. 4.

In the first two instances, no reason suggests itself for believing that the words were used in the restricted sense. On the contrary, the subjects are eminently among those as to which the necessity for a general law embracing the whole territorial dominion of the nation would be apparent.

That the "uniform laws on the subject of bankruptcies" should cover the entire country was obviously desirable. That the power to naturalize must be vested in the National Government, was of pressing importance and necessity (Federalist No. XLII, Ed. 1885, pp. 335,336); that it must be uniform, was almost a necessary consequence; that the power should be exercised in the territory then owned by the nation, was most desirable; for naturalization

was looked upon as an important stimulant to emigration, and it was a material object to increase the population in that region, the prospective value of whose land was expected to contribute so largely to the national resources.

One of the grievances against George III, thought worthy of distinct mention in the Declaration of Independence, was he had "endeavored to prevent "the population of these States, for that purpose "obstructing the laws for the naturalization of "foreigners," etc.

As to naturalization, moreover, the Constitution was understood by the Congress of 1795 to speak in this sense, for by an act "for carrying into com- "plete effect the power given by the Constitution "to establish an uniform rule of naturalization "throughout the United States," naturalization *in* the territories and of residents *of* the territories is expressly provided for (1 St. at L., 414).

Nor is it possible to suppose that it was intended to limit eligibility to the Presidential office to citizens residing within the States. Nor is any such suggestion to be found in the proceedings of the convention (Mad. Jour., Ed. 1893, pp. 585, 655).

In the third instance, we see only the use of a convenient expression, broader than required, in a case not demanding accuracy or discrimination, because the context plainly showed the meaning.

7.

The United States and The States United.

Our conclusion from this examination of the Constitution is that in determining the meaning of the words "United States," as here used, we must discard the interpretation which would make them synonymous with "the States United." This being so, it is difficult to see how else they can be

restricted in their meaning. To assume that they were intended to apply only to the lands then within the boundaries of the United States as then constituted is out of the question, unless we further assume that power was not given to extend those boundaries—even to adjacent territory. It is out of the question because no reason for such a discrimination can be suggested, and because if it be once admitted that "the United States" is here used with reference to the national boundaries, it must mean precisely that, whatever its boundaries from time to time may be.

8.

THE WORDS ARE QUALIFICATIVE, NOT RESTRICTIVE.

But we are relieved from the need of seeking for any restriction on the plain meaning of these words by the fact that it has been determined, in *Knowlton* v. *Moore*, *supra*, that they were not used with a restrictive, but with a qualificative, purpose; to indicate that the uniformity prescribed was geographical, not intrinsic. Thus the objection, otherwise a serious one, that our construction that the entire clause, including "throughout the United States," has no other meaning than it would have if those words were omitted, is fully answered, and it appears that so far as the *extent* of the restriction is concerned, there is nothing to show that it is not exactly coterminous with the power restricted, and therefore, *for this purpose*, it may be read as merely providing that "*all duties, imposts and excises* MUST BE UNIFORM."

9.

CONCLUSION.

Considering the clause in this light, even if we

leave out of sight the considerations, not applicable to the other prohibitory clauses in the Constitution, which superinduce the belief, as to this, that it was intended to be universal in its application, we submit that we were justified in the assertion, that it stands upon no other footing than they ; for though mandatory in form it is strictly, and solely, prohibitive in effect ; and when we consider the spirit we find that it and they can claim a common parentage in the spirit of justice, equality, and liberty, which animated the founders of our Nation.

IV.

When the Treaty of Paris took effect, Porto Rico ceased to be "a foreign country" within the meaning of those words as used in the Tariff Act.

The conclusion reached in the Courts below was erroneous, unless it be true, not only that Congress has power to lay a duty on goods brought from Porto Rico to New York after annexation, but that it has actually done so. Whether it has done so or not, depends upon the meaning of the words "imported from foreign countries" in the first section of the Tariff Act.

1.

The Plain Meaning of the Words "Imported from Foreign Countries."

Whatever else may be the effect of the Treaty of Paris, it certainly resulted in the cession of Porto Rico to the United States, and the acceptance of

that cession, and consequent assumption of sovereignty over the island, by the United States. It had been evacuated by the Spanish long prior to the exchange of ratifications; no disorder or insurrection has existed in the island; no other claim of dominion over it has been made on any part, and from the time of the exchange of ratifications it has been in the peaceable and undisputed possession and effective control of the United States, which then acquired as complete a title to it as to the ground upon which the Capitol at Washington stands, and has, by unquestioned right, exercised complete dominion over its inhabitants ever since. And from that time on the people of the island have neither been self-governing and independent, nor have they been the subjects of any other power, prince or potentate.

Is a country, of which all this is true, "a foreign country" as regards ours, according to any possible sense in which these very simple and unambiguous words can be used?

2.

EXTENSION OF TARIFF LAW NOT IN QUESTION.

It is to be observed, first and foremost, that the question now before us does not depend upon the extension of the operation of the tariff laws to a region in which they have not always applied; it is a question of the application of the tariff laws in the port of New York, and is essentially different from, and simpler than, that which would arise upon a shipment from a foreign country, or even from a home port within our former boundaries, to Porto Rico. Does the tariff law, which undoubtedly applies here, fix a duty on these goods? That depends upon whether they were imported from a foreign

country, and not upon any such question, as whether the Tariff Act imposes duties on goods brought into Porto Rico from abroad, or whether the system for the collection of duties has been extended to Porto Rico.

The question is, then, not whether this or that provision of law is presumed to be in force in "our new possessions," but whether any provision exists, in the law which undoubtedly operates in the port of New York, making goods dutiable when brought here from Porto Rico.

3.

THE IMPOSITION OF THE DUTY MUST BE CLEARLY ESTABLISHED.

It is a well recognized principle of tariff law that duties are imposed only by clear and express provision of law, and that in case of doubt, the presumption is against the Government.

The Liverpool Hero, 2 Gall., 184, 188.
U. S. v. *Wigglesworth*, 2 Story, 369, 373, 374.
Adams et al. v. *Bancroft*, 3 Sumn., 384, 387.
Powers v. *Barney*, 5 Blatch., 202, 203.
U. S. v. *Ullman*, 4 Ben., 547, 553.
Phil. & Read. R R. Co. v. *Kenney*, 18 Int. Rev. Rec., 92, 93.
U. S. v. *Isham*, 17 Wall., 496, 504.
Hartranft v. *Wiegmann*, 121 U. S., 609, 616.
Am. Net & Twine Co. v. *Worthington*, 141 U. S., 468, 474.

4.

FURTHER AS TO THE MEANING OF THESE WORDS.

Admitting every theory which fancy, or interest,

can suggest for the purpose of differentiating between an outlying possession, on the one hand, and what are generally known as the territories, on the other (and it may be observed that all such imagined differences tend to make the national dominion less restricted in the former than in the latter case), it would seem impossible to deny that, whether on an equal or on an inferior footing, Porto Rico is, in the strictest or the loosest sense of the word, a portion of "the American Empire."

> "The usage of the world is, if a nation be "not entirely subdued, to consider the holding "of conquered territory as a mere military occupation, until its fate shall be determined "at the treaty of peace. If it be ceded by the "treaty, the acquisition is confirmed, and THE "CEDED TERRITORY BECOMES A PART OF THE "NATION TO WHICH IT IS ANNEXED."
>
> *Per* MARSHALL, C. J., in *American Ins. Co.* v. *Canter*, *supra.*

But surely it cannot be said that Porto Rico is at the same time a part of the nation to which it has been annexed, and a foreign country.

Nor can it be said that goods brought from one to another part of the same country are "imported," according to the signification of that term in American jurisprudence. In view of the well-settled meaning of that word, the addition of "from foreign countries," borrowed from earlier tariff acts, is, indeed, tautological.

Woodruff v. *Parham*, 8 Wall., 123.

It was held in this case that the provisions of the Constitution forbidding any State, without the consent of the Congress, to "levy any imposts or "duties on imports or exports" did not apply to a tax on goods brought into one State from another,

and the Court said (per MILLER J.) that "in "the ordinary use of these terms at this day, "no one would for a moment, think of them "as having relation to any other articles than "those brought from *a country foreign to the* "*United States*" (p. 131).

And here, at least, we presume that the expression is not used "for tariff purposes," but in common parlance.

See also

Pittsburgh and Southern Coal Co. v. *Bates*, 156 U. S., 577.

5

FLEMING *v.* PAGE.

But we are told, in substance, that the meaning of the words is not the same in a Tariff Act as elsewhere, and that they there signify any region, whether under our dominion or not, which is not included in a collection district of our own; that "under our revenue laws, every port is regarded "as a foreign one, unless the custom house from "which the vessel clears, is within a collection dis- "trict established by act of congress, and the offi- "cers granting the clearance exercise their func- "tions under the authority and control of the laws "of the United States" (Op. of Bd. of Gen'l. App'rs., R., p. 14. 15).

However startling this assertion may seem, it is yet deserving of attentive and respectful consideration, being, as it is, a quotation from an opinion of this Court, rendered by Chief Justice TANEY:

Fleming v. *Page*, 9 How., 603–617.

This was an action to recover duties paid on goods

imported during the war with Mexico, from Tampico, which was in the *military occupation* of the United States, into the port of Philadelphia. The question presented to the Court was, whether Tampico, during such military occupation, was, for the time being, a foreign port. The Court held, of course, that the occupation of that part of Mexico by conquest did not permanently annex it to the United States; that "the law declaring the war" did not "imply an authority to the President to *enlarge* "*the limits of the United States* by subjugating "the enemy's country," and that the transfer of the title to foreign territory could "be done only "by the treaty-making power *or the legislative* "*authority*," and was "not a part of the power "conferred upon the President by the declaration "of war;" that "his conquests do not *enlarge the* "*boundaries of this Union*, nor extend the opera- "tion of our institutions and laws beyond the "limits before assigned to them by the legislative "power;" and that while foreign nations, under the rules of international law, were "bound to regard "the country, while our possession continued, as "the territory of the United States, and to respect "it as such * * * yet it was not a part of this "Union," for "the relation in which the port of "Tampico stood to the United States while it was "occupied by their arms did not depend upon the "laws of nations, but upon our own constitution "and acts of congress" (pp. 614, 615); and the learned Judge continued thus (p. 615):

> "The country from which these goods were "imported was invaded and subdued, and oc- "cupied as the territory of a foreign hostile na- "tion, as a portion of Mexico, and was held "in possession in order to distress and harass "the enemy. While it was occupied by our "troops, they were in an enemy's country, and

"not in their own; the inhabitants were still "foreigners and enemies. * * * But the "boundaries of the United States as they ex- "isted when war was declared against Mexico, "were not extended by the conquest; nor "could they be regulated by the varying "incidents of war, and be enlarged or "diminished as the armies on either side "advanced or retreated. They remained un- "changed. And every place which was out of "the limits of the United States, as previously "established by the political authorities of the "government, was still foreign; nor did our "laws extend over it. Tampico was, there- "fore, a foreign port when this shipment was "made."

This was the *ratio decidendi* of the case, and no one will deny that it is absolutely conclusive. We have already alluded to this part of Judge Taney's opinion, upon which, far from regarding it as in any possible aspect injurious to our case, we rely as clearly marking the distinction—apparently overlooked by the learned Judge who sat in the Circuit Court (R., p. 22)—between a temporary military occupation by a branch of the government having no power to "enlarge the boundaries" of the nation, and a permanent annexation, accomplished "by the treaty-making or legislative "power," and, consequently, "making the an- "nexed territory a part of the Union."

But having thus completely disposed of the case by an unanswerable argument, the Chief Justice proceeded to add another; to reinforce it by instances of the practice of the government, more or less in point; and to conclude it with the statement first quoted above.

This argument, if we understand it aright, is not really a new argument, but the same one extended

to another point of view; it still depends on the temporary character of the occupation. It is, in substance, that the fact that the ship's papers were issued from a custom house at Tampico, established under the authority of the United States, did not determine the character of the port from which the ship sailed as being that of a home port, because the branch of the Government which gave the clearance was exercising a mere temporary authority under the war power; "not for the pur- "pose of giving to the people of Tamaulipas the "benefits of commerce with the United States or "with other countries, but as a measure of "hostility, and as a part of the military operations "in Mexico" (p. 616). The learned Judge, indeed, dwells strongly, in this very part of his opinion, upon the point that the custom house at Tampico was "established in an enemy's country, "as one of the weapons of war," and he concludes that the permit and coasting manifest granted by the military authorities could not be recognized as "the documents required by the act of congress "when the vessel is engaged in the coasting trade, "nor could they exempt the cargo from the pay- "ment of duties" (p. 616). This, we suppose, means simply what we have suggested above; that although the vessel cleared by license of our own Government, the character in which and the agencies by which the Government was acting there were not such as to make the port from which it cleared a home port. As Judge TANEY had said before, "Tampico was * * * "a foreign port when the shipment was made" (p. 616), and the cargo was not exempted from the consequences because the clearance was obtained from the military authorities of the United States.

That the learned Judge intended to say that it a vessel sailed from a port *unquestionably within the United States*, but not within a collection district,

its cargo would be subject to duties on its entering a port within such a district, we cannot believe. The question whether goods are dutiable must depend, not upon whether the port where the voyage commences is one from which a vessel may legally be cleared under a coasting license, nor whether the vessel has been cleared at all, but whether the goods, properly or improperly, legally or illegally, have been brought from a foreign country. What was obviously meant was, that they might still have been brought from a foreign country, although cleared from a custom house established under the authority of the United States. If we are right in this, we readily admit that "this construction of the revenue laws "has been uniformly given by the administrative "department of the government in every case that "has come before it" (p. 616). But the learned Judge goes on to say: "And it has, indeed, been "given in cases where there appears to have been "*stronger grounds* for regarding the place of ship-"ment as a domestic port."

And he proceeds to enumerate, among a number of instances of the practice of the government, some in which duties were exacted on goods brought from Florida and Louisiana after cession. Before examining these, we must point out, that it cannot be said that the Chief Justice held that *in such instances* the practice of the government was correct, notwithstanding the "stronger grounds" of which he speaks. He states to what length the government, as he believed, had gone, but he has no occasion to go to that length himself. If he did so, however, it was unquestionably *obiter*.

But we must now see how far Chief Justice TANEY was accurate in stating the facts as to the practice of the government, and how far the instances cited by him are in point.

The Chief Justice states in the first place (p. 617) that by the sanction of the Attorney-General it was decided by the Treasury Department that goods imported from Pensacola after the cession of Florida and the taking of possession of Pensacola, but before it was erected into a collection district by Congress and the appointment of a collector was authorized, were liable to duty. This appears to be a clear misapprehension of the facts.

Although the treaty with Spain for the cession of Florida was made on February 22, 1819, it was not ratified until after February 22, 1821 (3 St. at L. 15th Cong. p. 523), and actual possession of East Florida was not delivered until July 10th, 1821, nor of West Florida until July 17th (Donaldson, The Public Domain, 116–118; and see *infra*, in the case of the Olive Branch.) But on March 3, 1821, in contemplation of the delivery of possession Congress had passed an act (3 St. at L. 15th Cong., p. 639) for the provisional government of Florida by the President, to be in force until the end of the first session of the next Congress, which commenced in December, 1821, in which act it was provided that "the laws of the United States relating to the revenue and its collection, subject to the modifications stipulated by the fifteenth article of the said treaty in favor of Spanish vessels and their cargoes, shall be extended to the said territories," *and the President was authorized to establish districts for the collection of the revenue, and to appoint collectors.*

It is true that certain parts of Florida were in the military occupation of the United States prior to the actual delivery of possession by Spain, but it was not, of course, until such voluntary and complete delivery that the cession took effect and that Florida became "a part of the Union."

From the reference in Mr. Webster's brief (p. 613) to the opinion of the Attorney-General in the

case of the *Olive Branch*, we are led to suppose that this is the decision of which Judge Taney was speaking, but if Mr. Wirt's opinion in that case is that to which he refers, he is strangely mistaken, for it is directly opposed in its conclusion to the Chief Justice's suggestion.

The *Olive Branch* came into the port of Pensacola from England before the delivery of possession of East Florida to the United States. Its goods appear to have been landed, and the Spanish duties, which were very light, to have been paid, and the goods subsequently to have been reshipped. The *Olive Branch* left Pensacola on July 14th and landed her cargo within a port of the United States, and the question submitted to the Attorney-General appears to have been, whether her goods came from a foreign port.

The Attorney-General's opinion, which is dated on August 20th, 1821, is based on the mistaken assumption, apparently arising from a confusion with the date of the surrender of West Florida, that possession of East Florida was not handed over until July 17th 1821, after the clearing of the vessel, and held, of course, that the ship did come from a foreign port. He proceeded, however, to give his opinion upon the *supposititious* case of goods brought to Florida in contemplation of the transfer of possession, and with no real intention of finally delivering the goods there, but for the mere object of avoiding a duty; and reshipped to a home port after annexation. Upon the question whether such goods were within our tariff laws, he said: "Our laws impose duties only on goods imported into the United States from some foreign port or place; if, therefore, in the case put, the importation be in contemplation of law an importation from the Floridas, THE CASE IS NOT WITHIN OUR LAWS, BECAUSE AT THE TIME OF THE IMPORTA-

TION THE FLORIDAS WERE NOT FOREIGN PORTS OR PLACES."

1 Op. Atty.-Gen., 483.

A second opinion of Mr. Wirt's on the same question, dated January 24th, 1823, will be found in

5 Op. Atty.-Gen., 748.

From this it appears that the Attorney-General had mistaken the date of the handing over of possession which was actually July 10th, two days before the vessel sailed (*v. supra* p. 104). The Attorney-General, upon this state of facts, holds that the goods were not dutiable unless the voyage was continuous and the landing at Pensacola was a mere pretext, and he proceeds to discuss that question, which is, of course, not material to our present inquiry.

This is the only one of the instances cited by the Chief Justice which, upon his own statement of the facts, is at all material, for in no other did the United States, at the time of the decisions referred to, have *possession* of the port or place from which the importations were made.

As to the ports in Louisiana of which the Chief Justice speaks, he himself states that they were "still in the possession of Spain."

As to Amelia Island, it lay on the *eastern* coast of Florida, was no part of *West* Florida, to which we claimed title, and never became a part of the United States until the delivery of possession of Florida in 1821. The Island was occupied by our troops at the time of President Madison's attempt to take possession of both the Floridas, but the troops were withdrawn in March, 1813, after Congress had refused to pass an act sanctioning the occupation of East Florida (7 Adams' Hist. U. S., 211). It was again occupied by the United States as an act

of necessity occasioned by the McGregor expedition, but the occupation was not, of course, under any claim of title, nor permanent in its nature (3 Schouler Hist. U. S., 29, 58, 59). It is apparently to this latter occupation that the Chief Justice referred.

In House Doc. No. 117, 15th Cong., 2d Session, Vol. 6, the Secretary of the Treasury reports to Congress, in reply to a request for information as to Pensacola and Amelia Island, that "no duties have, within the knowledge of the Department, been collected by or on account of the United States in Amelia Island or at Pensacola," and that "vessels arriving at the ports of the United States from Pensacola or Amelia Island are considered and treated as foreign vessels," as they undoubtedly were.

From the same documents it would appear that in 1818 some arrangements had been made without authority from the Treasury Department to collect duties upon entry in Amelia Island, but this was discontinued by order of the Secretary of the Treasury of May 14, 1818.

That the Chief Justice recognized his mistake in these respects would appear from his having concurred in the unanimous opinion of the Court rendered by Mr. Justice WAYNE in *Cross* v. *Harrison* 16 How., 164, of which we shall presently speak at greater length. In reply to a similar suggestion made by counsel in that case, the Court said:

> "In respect to the suggestion that it has
> "not been the practice of the United States to
> "collect duties upon importations of foreign
> "goods into a ceded territory until Congress
> "has passed an act for that purpose, counsel
> "cited the cases of Louisiana and Florida.
> "The reply is, that the facts in respect of both
> "have not been recollected. There was no

" forbearance in either instance, in respect to
" duties upon imports, until Congress had
" acted. Louisiana was ceded by a treaty
" bearing the date of 30th of April, 1803, but
" the possession of it by the United States de-
" pended upon the terms of final ratifications
" by the parties to it, and upon the delivery of
" it by a commissioner to be appointed by the
" French Government to receive the transfer
" from Spain to France, and by him to be im-
" mediately transferred to the United States.
" Articles 1, 2, 4, 5.

" The surrender from Spain to France was
" formally made on 30th of November, 1803,
" and that to the United States was done on
" the 20th of December, 1803. It was known
" in Washington, by a letter from the com-
" missioner appointed to receive it, early in
" January. It is said, that from that time
" until the act of the 24th of February, or,
" as was provided for in the act, until thirty
" days after, Louisiana was not considered, in
" a fiscal sense, as a part of the United States;
" and that duties were not only not collected
" by the United States on importations into
" Louisiana, but that duties were charged
" on goods brought from Louisiana into the
" United States. It seems to have been for-
" gotten that our commercial intercourse
" with Louisiana had been the subject
" of legislation by Congress in several
" particulars from the year 1800; and that
" before the revenue system could be ap-
" plied, it was necessary to repeal that special
" legislation. Mr. Gallatin, in his report of
" the 25th of October, 1803, (American State
" Papers, Finance, Vol. 2, 48) suggested that
" it should be done. Congress, however, did
" not do so until the act of the 24th of Febru-

" ary, 1804, was passed, by the third section " of which the repeal was effected. The post- " ponement of the operation of the act for " thirty days longer, was with the view to pre- " vent any conflict of rights or interests be- " tween what would be the new regulations of " commerce under the act, and those which " had preceded them.

" It is only necessary to say as to Florida, " that the treaty of the 22d February, 1819, " was not ratified by the United States until " the 19th February, 1821. In a few days after- " ward the act was passed extending our reve- " nue system to it, subject to the stipulation " in the 15th article of the treaty in favor of " Spanish vessels and their cargoes. There " was, then, no interval in either instance " where duties were not collected upon for- " eign importations, because Congress had not " legislated for it to be done."

6.

THE GOVERNMENT'S PRACTICE IN THE CASE OF LOUISIANA.

As stated by Judge WAYNE in the passage just quoted, the only period during which Louisiana was, after annexation, without special legislation in regard to the collection of duties was from the delivery of possession on December 20, 1803, to March 25, 1804, when the act of February 24th (2 St. at L., 8th Cong. 1st Sess., ch. xiii, p. 251) took effect, which extended the general customs laws to Louisiana and established a custom house at New Orleans.

It is undoubtedly true that Mr. Gallatin—whether upon consultation with the legal advisers of the government does not appear—sup-

posed that the United States tariff did not apply until that date, and in a letter of instructions to the *collector* at New Orleans dated February 27th, 1804, he goes so far as to state, not only that articles imported before March 25, 1804, into New Orleans, even from the United States, would be liable to duty, but also that "articles exported before that date from New Orleans to the United States were liable to pay export duty." Whether the goods paying such export duties were to be required to pay an import duty also on being brought to another part of the United States, was not, of course, a matter within the scope of the instructions which the Secretary of the Treasury was giving. But if this case should be considered as included in them, it certainly was not upon the ground suggested by the Chief Justice, that they were brought from a place which had not been erected into a collection district, or, if brought by sea, that the vessel did not obtain its papers from an officer in such a collection district, for, as early as November 14, 1803, in making provision for the occupation of New Orleans under the treaty pursuant to the act of October 31st, 1803, (2 St. at L., 8th Cong. 1st Sess., ch. I, p. 245) Mr. Gallatin instructed the collector at Fort Adams in the Mississippi district, to exercise the powers of collector at New Orleans. The mistake, as we suppose it to be, of Mr. Gallatin, was not in assuming that New Orleans remained a foreign country, but in assuming that the rate of duties imposed by the Spanish laws continued in force after it had become a part of the United States and until otherwise provided by Congress. In other words, he overlooked the constitutional requirement of uniformity, but he evidently did not fall into the error attributed to him by Judge TANEY, of treating a place in a newly acquired country as a

foreign port after annexation by treaty and taking of possession.

Whether any duties were ever exacted upon goods brought from New Orleans into another part of the United States is a matter as to which we can procure no information, and so far as we are aware, therefore, the most that can be said as to the practice of the government prior to the acquisition of California is that Mr. Gallatin, as Secretary of the Treasury, in providing for possible cases, and not in passing upon an actual case, did not recognize the tariff laws of the United States as applying immediately, *proprio vigore*, to Louisiana upon its annexation.

7.

CROSS *v.* HARRISON.

But this opinion of Mr. Gallatin's, and, if there be anything to the same effect in *Fleming* v. *Page*, then the decision in that case also, are directly opposed to the law as laid down by this Court in

Cross v. *Harrison*, 16 How., 164.

It is the law of this Court, as laid down in that case, not only that territory ceded by a treaty of peace "becomes a part of the nation to which it is annexed," and that the Constitution of the United States is in force in the government of such country, but that the tariff law is one of those general laws which in their nature apply throughout the entire national dominion, and which of their own force supercede the former laws immediately upon annexation. In other words, that territory, when annexed, ceases to be "a foreign country *within the meaning of the tariff act.*"

As we have already suggested, the decision was much broader than any application which can be

made of it in the case at bar, for it involved an actual extension of the then existing tariff act to "a new possession," and not merely a question of its application within the previous limits of the country.

The suit was brought to recover duties paid to the defendant as collector under an appointment by the Military Governor of California before it was erected into a collection district by act of Congress.

A part of the duties was so paid prior to the exchange of ratifications, under a war tariff established by the President while the United States was in occupation of California by right of conquest. Another part was paid after the exchange of ratifications but before the notification thereof to the Military Governor; and still another part, and that with which we are directly concerned, was paid after such notification. In its opinion the Court disposed of the question of duties paid prior to the exchange of ratifications upon the ground that they were collected while the United States was exercising belligerent rights in California. In closing this branch of the opinion the Court says, "But after the ratification of the "treaty California became a part of the United "States, or a ceded, conquered territory."

As to the intermediate period, before notification to the Military Governor of the exchange of ratifications, during which duties were still collected under the war tariff established by the President, the Court held that duties were properly so collected until the Military Governor had had notice from his own government that peace had finally been concluded and that the annexation had taken place. But as to the duties collected after the notification, the Court distinctly held that the general tariff law applied, and that duties were properly collected under it. That part of the

opinion which fully treats of this subject will be found at pages 192 to 202 of the report, but in an earlier part of the opinion WAYNE, J., had already said, in speaking of the professed intention of the Governor of California to collect duties *under the tariff act:*

> "This last was done with the assent of the "Executive of the United States, or *without* "*any interference to prevent it.* Indeed, from "the letter of the then Secretary of State, "and from that of the Secretary of the Treas-"ury, we cannot doubt that the action of the "Military Governor of California was recog-"nized as allowable and *lawful* by Mr. Polk "and his cabinet. We think it was a rightful "and correct *recognition* under all the circum-"stances, and WHEN WE SAY RIGHTFUL, WE "MEAN THAT IT WAS CONSTITUTIONAL, AL-"THOUGH CONGRESS HAD NOT PASSED AN ACT "TO EXTEND THE COLLECTION OF TONNAGE "AND IMPORT DUTIES TO THE PORTS OF CALI-"FORNIA" (pp. 189, 190).

When it further and more fully considers this question, the Court first disposes (pp. 192–195) of the suggestion that the military authorities had no authority—not, to impose a *new rate* of duties, but—to *collect duties under the general Tariff Act*, by showing that "the government, of which Col-"onel Mason was the executive, had its origin in "the lawful exercise of a belligerent right over a "conquered territory," and "did not cease, as a "matter of course, or as a necessary consequence "of the restoration of peace," but "continued "until it had been legislatively changed."

The whole question here was as to the power to *collect* the duties, and nowhere in the opinion of the Court can we find any warrant for the interpre-

tation put upon it by the learned Judge who delivered the opinion of the Board of Appraisers, that the *imposition* of the duties was upheld as a *new war tariff*, substituted for the first; nor for his assumption, that because the existing military government necessarily continued until another took its place, it had a right to levy military contributions over "a part of the United States" (p. 191), and that in a time of peace.

The point of the decision was that the existing government of California,—that is to say, the military government, which alone was in possession,—continued to be the lawful government of that part of the United States until Congress otherwise provided; upon the familiar principle to which we have already adverted. Under this power that government *de facto* was, in the judgment of the court, authorized to *collect duties at the rates imposed by law*. The court held that the rate of duties in force in California was *imposed by the general laws of the United States*, taking effect upon the annexation, and it was never intimated that the act of the military authorities in collecting duties at the rates prescribed in the tariff act was equivalent to an exercise of legislative power putting in force a new tariff separate from, but levying the same rate of duties as, the United States tariff. No such claim as this appears even to have been made; and besides this, it would have been distinctly false as a matter of fact, for neither the government at Washington, nor the military authorities at California ever undertook to *establish* a tariff, and both distinctly recognized that a tariff was established by virtue of the application of the general customs law to the region.

It appears from the statement of facts, that after notification to the military authorities of the exchange of ratifications, the war tariff was abandoned, and the collector, appointed as aforesaid,

acted upon the assumption that the tariff act then enforced extended—"*proprio vigore*," —to California. This he did under instructions from the Secretary of State (of California) to the effect that "the tariff of duties "for the collection of military contributions will "immediately cease, and the revenue laws and "tariff of the United States will be substituted in "its place" (p. 183). At the same time, the Governor, who had theretofore, under instructions from Washington, and in conjunction with the other military authorities, established, and caused to be enforced, a "tariff of duties for the collection of military contributions" (p. 182), informed the War Department that "I feel it my duty to attempt the collection of duties *according to the United States Tariff of 1846*" (183).

Shortly afterwards, the Secretary of the Treasury issued a circular in which, while doubting the ability of his department to *collect duties in California* until a system of collection was organized by Congress, he distinctly recognized that goods brought there from abroad were dutiable; and the recognition by the Governor of the extension of the tariff act to California was also approved by the Secretary of State of the United States (see pp. 184, 185).

It thus sufficiently appears from the documents quoted in the report of the case, that the government recognized California as a part of the United States immediately upon the treaty going into effect, and that it further recognized that its war tariff was superseded, and that the general tariff laws of the United States were in effect. These facts are still more clearly brought out by further documents which will be found in the complete record of the case, from the copy of which on file in the office of the Clerk of this Court we have re-

printed some extracts in Appendix I at the end of this brief.

We think these extracts, together with the facts stated in the report and in the opinion of the Court, show conclusively that the government distinctly recognized the Constitution and the tariff law as being in force in California ; that it neither claimed nor exercised any authority in the way of enacting a tariff law or enforcing a tariff law of its own enactment, and that so far, indeed, as the government at Washing-ton was concerned, it was considered as unlikely that the laws recognized to exist could be enforced by the collection of duties.

In other words, it was distinctly recognized that the application of the revenue law did not depend upon the fact whether any collection district had been established, and that the fact that there was no machinery for enforcing the positive part of the law did not prevent the application of its negative part. We must now see how the facts of the case were viewed, and how the law was applied to them, in the opinion of the Court.

Referring to the circular of the Secretary of the Treasury. from which we have quoted, the Court says (p. 194):

> "Nothing but an almost willing misunder-
> " standing of the circular of the Secretary of
> " the Treasury, Mr. Walker, could have caused
> " a doubt as to the liability of the importers of
> " foreign goods into California to pay duties
> " upon them. That part of the Secretary's
> " circular relating to duties is in our state-
> " ment of the case. It will show that the Sec-
> " retary says no more than this: that as Con-
> " gress had not brought California by law
> " within the limits of any collection district, or
> " authorized the appointment of officers to
> " collect the revenue accruing upon the im-

" portation of foreign dutiable goods into that
" territory, that his department may be unable
" to collect them. Revenue accruing upon
" the importation into California of foreign
" dutiable goods, means *that the goods were*
" *liable to pay the duty*. There is nothing un-
" certain in the Secretary's circular. It does
" not warrant in any way the declaration that
" it was his opinion that *the goods were not*
" *dutiable*, or that they might not be *legally* col-
" lected, though that could not be done by the
" instrumentality of officers of a collection dis-
" trict. Our conclusion, from what has been
" said, is, that the civil government of Cali-
" fornia, organized as it was from a right of
" conquest, did not cease or become defunct
" in consequence of the signature of the treaty
" or from its ratification. We think it was
" continued over a ceded conquest, without
" any violation of the Constitution or laws of
" the United States, and that until Congress
" legislated for it, the duties upon foreign
" goods imported into San Francisco were
" legally demanded and lawfully received by
" Mr. Harrison, the collector of the port, who
" received his appointment, according to in-
" structions from Washington, from Governor
" Mason."

The Court then proceeded (p. 195) to consider the objection, that "as there was no treaty or *law* " enjoining or permitting the *collection* of the " duties, that the exaction of them by the defend- " ant was illegal" and that " none of the existing " acts of Congress * * * could be applied until " Congress had passed an act giving them opera- " tion, and had legislated California into a collec- " tion district, with denominated ports of entry" (*p. 196*). Here, again, it will be noted that coun

sel for the importer appear almost to have conceded that duties were imposed by the Tariff Act on goods brought into California, and to have rested their case on the absence of any machinery to *collect* them. "The objection assumes," says the Court, "that under the laws then in force, "duties could not be *collected* in California after "the war * * * had been concluded."

The answer of the Court to this objection must be quoted in full:

> "It was urged, that our revenue laws cov-
> "ered only so much of the territory of the
> "United States as had been divided into col-
> "lection districts, and that out of them no au-
> "thority had been given to prevent the land-
> "ing of foreign goods or to charge duties upon
> "them, though such landing had been made
> "within the territorial limits of the United
> "States. To this it may be successfully re-
> "plied, that collection districts and ports of
> "entry are no more than designated localities
> "within and at which Congress had extended
> "a liberty of commerce in the United States,
> "and that so much of its territory as was not
> "within any collection district, must be con-
> "sidered as having been withheld from that
> "liberty. It is very well understood to be a
> "part of the laws of nations, that each nation
> "may designate, upon its own terms, the ports
> "and places within its territory for foreign
> "commerce, and that any attempt to introduce
> "foreign goods elsewhere, within its jurisdic-
> "tion, is a violation of its sovereignty. It is
> "not necessary that such should be declared
> "in terms, or by any decree or enactment, the
> "expressed allowance being the limit of the
> "liberty given to foreigners to trade with such
> "nation. Upon this principle, the plaintiffs

"had no right of trade with California with "foreign goods, excepting from the permis- "sion given by the United States under the "civil government and war tariff which had "been established there. And when the "country was ceded as a conquest, by a treaty "of peace, no larger liberty to trade resulted. "*By the ratification of the treaty, California* "*became a part of the United States.* And as "there is nothing differently stipulated in the "treaty with respect to commerce, *it became* "*instantly bound and privileged by the laws* "*which Congress had passed* to raise a rev- "enue from duties on imports and tonnage. "It was bound by the eighteenth section of "the act of 2d of March, 1799. The fair in- "terpretation of the second member of the "first sentence of that section is, that ships "coming from foreign ports *into the United* "*States* were not to be permitted to land any "part of their cargoes in any other than in a "port of delivery, confined then to the ports "mentioned in the act; afterward applicable "to all other places which might be made "ports of entry and delivery, and excluding "all rights to unlade in any part of the United "States which had not been made a collection "district with ports of entry or delivery. * * *

"It has been sufficiently shown that the "plaintiffs had no right to land their foreign "goods in California at the times when their "ships arrived with them, except by a compli- "ance with the regulations which the civil "government were authorized to enforce—first, "under a war tariff, and afterward under the "existing Tariff Act of the United States. By "the last, foreign goods, as they are enumera- "ted, are made dutiable—they are not so "because they are brought into a collection

" district, but because they are imported into " the United States. *The Tariff Act of 1846* " *prescribes what that duty shall be.* * * * " The right claimed to land foreign goods " within the United Statets at any place out of " a collection district, if allowed, WOULD BE " A VIOLATION OF THAT PROVISION IN THE " CONSTITUTION WHICH ENJOINS THAT ALL " DUTIES, IMPOSTS, AND EXCISES, SHALL BE " UNIFORM THROUGHOUT THE UNITED STATES. " Indeed, it must be very clear that no such " right exists, and that there was nothing in the " condition of California to exempt importers of " foreign goods into it from the payment of *the* " *same duties which were chargeable in the* " *other ports of the United States.* As to the " denial of the authority of the President to " prevent the landing of foreign goods in the " United States out of a collection district, it " can only be necessary to say, if he did not do " so, it would be a neglect of his constitu- " tional obligation 'to take care that the laws " be faithfully executed.'

" We will here briefly notice those objec- " tions which precede that which has been dis- " cussed. The first of them, rather an asser- " tion than an argument—that there was " neither treaty nor law permitting the collec- " tion of duties—has been answered, it having " been shown that the ratifications of the " treaty *made California a part of the United* " *States*, and that as soon as it became so, *the* " *territory became subject to the acts which* " *were in force to regulate foreign commerce* " *with the United States*, after those had " ceased which had been instituted for its " regulation as a belligerent right.

" The second objection states a proposition " larger than the case admits, and more so than

" the principle is, which secures to the inhab-
" itants of a ceded conquest the enjoyment of
" what had been their laws before, until they
" have been changed by the new sovereignty
" to which it has been transferred. In this
" case, foreign trade had been changed in vir-
" tue of a belligerent right before the terri-
" tory was ceded as a conquest, and after that
" had been done by a treaty of peace, the in-
" habitants were *not remitted to those regula-*
" *tions of trade under which it was carried*
" *on whilst they were under Mexican rule;*
" *because they had passed from that sover-*
" *eignty to another*, whose privilege it was to
" permit the existing regulations of trade to
" continue, and by which only they could be
" changed. We have said in a previous part
" of this opinion, that the sovereignty of a
" nation regulated trade with foreign nations,
" and that none could be carried on except as
" the sovereignty permits it to be done. In
" our situation, that sovereignty is the 'consti-
" ' tutional delegation to Congress of the power
" 'to regulate commerce with foreign nations,
" ' and among the several States, and with the
" 'Indian tribes'" (pp. 196-199).

For the reasons already suggested, it cannot be that the learned Judge who delivered the opinion of the Board of Appraisers was right when, after quoting almost as fully as we have done from the opinion in *Cross* v. *Harrison*, he said: "These views must be interpreted in the light of the fact that *the Tariff Act of 1846 was put in operation by the military Governor of California with the authority of the President*" (R., p. 18). This statement is contrary not only to the facts, but to the law, and the Court did substantially hold "that this act was opera

tive *ex proprio vigore* on the mere cession of California to the United States under the provisions of the treaty of peace."

That the military government continued as a government *de facto* is expressly admitted in the opinion of the Court, and is of course true; that it had any legislative powers whatever is a matter upon which it was not necessary for the Court to touch, because no claim had been made that it had exercised such powers; and still we are quite ready to to concede that so far as local legislation was concerned, such a government could exercise legislative power. This concession arises from the necessities of the situation of newly annexed territory and can have no possible application to an attempt to legislate on matters of common and general interest to the new territory and to the nation at large. The case of *Leitensdorfer* v. *Webb* (20 How., 176), cited at p. 10 of the record, is therefore not in point. The authorities which control upon this question are those which we have already cited, showing the distinction between the law municipal and the law political, and summed up in the passage already quoted from the opinion of Judge FIELD in *Chicago, &c., Ry. Co.* v. *McGlinn*, 114 U. S., 546, which we will venture to repeat here, in part:

> "It is a general rule of public law, recog-
> "nized and acted upon by the United States,
> "that whenever political jurisdiction and
> "legislative power over any territory are trans-
> "ferred from one nation or sovereign to an-
> "other, the municipal laws of the country,
> "that is, laws which are intended for the pro-
> "tection of private rights, continue in force
> "until abrogated or changed by the new gov-
> "ernment or sovereign. By the cession pub-
> "lic property passes from one government to

"another, but private property remains as be-
"fore, *and with it those municipal laws which*
"*are designed to secure its peaceable use*
"*and enjoyment.*

"As a matter of course, all laws, ordinances,
"and regulations in conflict with the political
"character, institutions, and constitution of
"the new government are at once displaced."

The government *de facto*, which necessarily continues to exist until replaced by a new government, is, of course, limited in its legislative power to that character of laws which also necessarily and presumptively continue in force until altered; that is to say, to what Judge FIELD, in the above quotation, called "the municipal laws of the country." But even if general power of legislation is to be inferred in such a *de facto* government, it would, of course, be preposterous to suppose that it could enact laws in violation either of constitutional provisions or of general national laws, which take effect immediately upon the annexation. This is the exact theory which was adopted by the Government upon the annexation of California, and which was held in *Cross* v. *Harrison* to be the true exposition of the law.

We submit, that nothing but "an almost willing misunderstanding" of the opinion of the Court can torture it into a declaration of the—certainly novel—principle, that a military government, left in authority by a declaration of peace and an annexation of the country which it occupies, does not merely continue as the only existing government, for the enforcement of the local laws of the country annexed, and the general and national laws of the annexing country, but is vested with general legislative power; or can ignore in it the plain recognition that those *general laws* of the annexing country, which in terms or by necessity

apply to it as a whole, are in force from the time of the annexation.

It will not have escaped the attention of the Court that a prominent part in solving the problem of the collection of duties in California was taken by General Halleck, a distinguished authority upon the subject of international law. We refrain from quoting at length his exposition of the case of *Cross* v. *Harrison* in his work on International Law, which the Court will find in Chapter XXXIII, Section 4 (1st Edition, p. 815).

The suggestion made in the opinion of the Board of General Appraisers as an *argumentum ab inconvenienti*, that under his power of establishing a war tariff the President might, while he continued to govern in Porto Rico after its annexation, have admitted all goods into Porto Rico free of duty, and that, if our argument is sound, goods so admitted would be entitled to free entry into our ports, is easily answered; for, if our argument is sound, it is not true that the President could have admitted goods into Porto Rico free of duty, as our argument assumes that the general tariff laws of the United States imposed a duty upon goods imported there.

The President's power to establish a war tariff and to ordain that there should be no duties on importations into the Island—if that power be a consequence of the other—ceased when the treaty became effective.

Dutiable goods brought into a port of the United States where no duties were collectible, would simply continue to be subject to duties, wherever taken. This point is fully considered and decided in *Cross* v. *Harrison*, and it is there also suggested that such action as that supposed on the part of the President would be "a neglect of his constitutional obligation to take care that the laws be faithfully executed" (p. 198).

8.

PRACTICE OF THE GOVERNMENT AS TO CALIFORNIA AND ALASKA.

The case of *Cross* vs. *Harrison* shows, among other things, that since 1848 at least the construction of the law upon which the government has acted has been strictly consonant with our contention, and absolutely discordant with that which Judge Taney imputes to it in the cases of Louisiana and Florida.

Whether upon a question of this character the Court would attach much importance to governmental construction may well be doubted, especially in view of the rarity of the cases in which, and of the short spaces of time within which, there can have been any occasion for applying such construction. But if the question is to be determined by the action of the government, there is still a further precedent upon which we may rely, in the case of the fourth and only remaining instance in which the question has arisen.

We refer to the action of the government in regard to ALASKA.

The treaty of cession was ratified on June 20, 1867, and possession was delivered at the same time (Tr. & Conv. p. 939). No Act of Congress extending the revenue laws to Alaska and erecting a collection district was passed until July 27, 1868 (15 St. at L. 40th Cong. 2d Sess. c. 273, p. 240). A period of more than one year, therefore, elapsed before Alaska, according to the contention of our opponents, "became a part of the United States for tariff purposes."

And yet during that period goods from Alaska were, under a decision by the Secretary of the Treasury, admitted free of duty.

Synopsis Treasury Decisions, 1868, No. 74, p. 20.

By the courtesy of the Treasury Department we are enabled to quote in full in Appendix II to this brief the letter of the Secretary of the Treasury to the Collector of the Port of New York of April 6, 1868, referred to in this citation.

Later, in a question arising as to the extension to Alaska of the general laws relative to Indians, we find the doctrine of *Cross* v. *Harrison* applied to that part of the United States by the Secretary of State, Mr. Seward, as follows:

> "I understand the decision of the Supreme "Court of the United States, in the case of "Harrison *v.* Cross (16 How., 164–202) to de- "clare its opinion that upon the addition to "the United States of new territory by con- "quest and cession, the acts regulating for- "eign commerce attach to and take effect with- "in such territory *ipso facto*, and without any "fresh act of legislation expressly giving such "extension to the pre-existing laws. I can "see no reason for a discrimination in this "respect between acts regulating foreign "commerce and the laws regulating inter- "course with the Indian tribes. There is in- "deed a strong analogy in the two subjects. "The Indians, if not foreigners, are not citi- "zens, and their tribes have the character of "dependent nations under the protection of "this Government. As Chief Justice Mar- "shall remarks, delivering the opinion of the "Supreme Court in Worcester *v.* The State of "Georgia (6 Peters, 557) 'the treaties and "laws of the United States contemplate the "Indian Territory as completely separated "from that of the States and provide that all "intercourse with them shall be carried on "exclusively by the Government of the Union.'
>
> "The same clause of the Constitution in- "vests Congress with power to regulate com-

"merce with foreign nations * * and with
"the Indian tribes.

"The act of June 30, 1834 (4 Stat., 729), de-
"fines the 'Indian country,' as, in fact, 'all
"that part of the United States west of the
"Mississipi and not within the States of Mis-
"souri and Louisiana, or the Territory of Ar-
"kansas.' This, by a happy elasticity of ex-
"pression, widening as our domain widens, in-
"cludes the territory ceded by Russia."

Whart. Dig. Int. Law, § 4, ch. 1, p. 15.

9.

SUMMARY OF THE ARGUMENT AS TO THE CONSTRUCTION AND APPLICATION OF THE TARIFF ACT.

Whether, when the Treaty of Paris took effect, the island of Porto Rico became a subject province, a dependency, a colony, a territory, or a polity of a sort which cannot be precisely defined by any word in our language, it did then immediately become a part of the dominions of this Nation, and, therefore, ceased to be a foreign country; and, as the Tariff Act imposes duties only on goods brought from foreign countries, the exaction of which we complain was not warranted by law.

This conclusion does not depend upon the question, whether, when Porto Rico became part of our dominions, the Tariff Act took effect in that Island. It is a question of an exaction made at the port of New York; no one denies that the Tariff Act applies there, and the only question is, as to the plain meaning of two plain English words.

If, however, it were conceded that those words, when used in a Tariff Act, have a different meaning than when used anywhere else, and there signify any region, whether within the dominions of the United States or such as in the ordinary use of

the words would be called foreign, in which the tariff laws of the United States are not in force, this conclusion is not varied; for immediately upon the annexation, the Tariff Act, with all other general laws of the United States, not locally applicable, took effect there; and Porto Rico thereupon ceased to be a foreign country "within the "meaning of" that Act.

V.

In Conclusion.

The well-recognized intentions and purposes of the makers of the Constitution, its evident spirit, the plain meaning of its words, the judicial interpretation of its provisions, all lead inevitably, as we think we have demonstrated, to these clear results:

1. The people of the United States, in and by the Constitution, organized and erected one and the same government, of defined and limited powers, for all people who might inhabit within the domains of the Nation; exercising in the States, it is true, a part only of the ordinary functions of government, but nowhere capable of exercising any powers except those delegated to it. The whole purpose and theory of the Constitution is the establishment in a permanent form, unalterable except by the people themselves, of fundamental principles of government applicable in all time and in every place.

2. The power to govern the people inhabiting the territory of the Nation, which is delegated by the Constitution to Congress, is, like all other powers, limited and defined by the Con-

stitution ; and that branch of the government, like the others, is incapable of transcending the limits so established.

3. The Constitution limits the general power of taxation delegated by it to the Congress by the mandate that all duties, imposts and excises shall be uniform throughout the entire domain of the Nation.

We believe, however, that we have also succeeded in our endeavor to prove that neither the Treaty of Paris, nor the act of Congress under color of which the payment was exacted, which the appellant seeks to recover, are capable of the construction that they violated the constitutional provisions which we have just attempted to summarize ; that the Tariff Act as a general law of the United States is also of full force and effect throughout the national domain ; that it does not comtemplate the imposition of any tax upon goods transported from one place within the limits of that domain to another, and, moreover, that its plain and simple language is not susceptible of the construction that it provides for such a tax.

For the reason, then, that the exaction of which the appellant claims was neither warranted by the law, nor sanctioned by the Constitution, it is submitted that the decision of the Court below should be reversed, and the cause remanded with the appropriate directions.

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APPENDIX I.

Extracts from Record in Cross v. Harrison.

CIRCULAR OF THE TREASURY DEPARTMENT, OCT. 7, 1848 (P. 135).

"Under these circumstances, though this "Department may be unable to collect the "duties accruing on importations from foreign "countries into California, yet, if foreign dutia- "ble goods should be introduced there, and "shipped thence to any port or place of the "United States, they will be subject to duty, "as also to all the penalties prescribed by law "when such importation is attempted without "the payment of duties.

LETTER FROM MR. MARCY, SECRETARY OF WAR, TO COL. MASON, OCTOBER 9TH, 1848 (P. 42).

Referring to the President's letter of Oct. 7th, 1848 (p. 26), he says:

"The general positions there maintained are "that, at the conclusion of the treaty of peace "between the United States and Mexico the "military government, which was established "in California under the laws of war ceased to "derive its authority from this source of "power, but the termination of the war left "an existing government, a government *de* "*facto*, in full operation, and this will con- "tinue with the presumed consent of the peo- "ple until Congress, which has full and "exclusive power to organize governments for "the territories, shall provide a government "for them. * * * But the government "*de facto* can of course exercise no powers "inconsistent with the provisions of the Con- "stitution of the United States, which is the

"supreme law of the land for all the States "and territories of our Union. *For this rea-* "*son* no import duties can be levied in Cali- "fornia on articles the growth, produce or "manufacture of any state or territory of the "United States, and no such duties can be im- "posed in any part of the Union on the pro- "ductions of California; nor can duties be "charged on such foreign products as have "already paid duties in any part of the United "States. * * * Though he (the Military Com- "mander) has not the right to change or mod- "ify the existing civil government, it will be "his duty to regard it as an existing govern- "ernment until it is changed by competent "authority" (p. 43).

HALLECK TO HARRISON, FEB. 24, 1849 (P. 92):

"In the instructions just received from "Washington, it is assumed that by the treaty "of peace with Mexico, California has become "a part of the Union; that the Constitution "of the United States is extended over this "territory and is in full force throughout its "limits."

He then explains that there being no collection districts, vessels not having entered their goods in a regular port, "ought properly to be warned away and refused admission."

"Such is the course required by a strict in- "terpretation of the law, but as this would "subject such vessels to great inconvenience "and expense, the authorities having charge "of the matter have resolved to present to them "the following alternative: to pay here all "duties and fees, and to execute all papers "prescribed by the revenue laws of the United

"States, and upon their doing so, their goods "will be admitted. * * *

"No vessel can demand as a right to enter "any foreign dutiable goods here, and you "will not be liable to prosecution for refusing "such entry; and by a voluntary payment of "her duties here, in preference to going to a "regularly established port of entry, such "vessel binds herself to abide by the revenue "laws of the United States in the absence of "all instructions to the contrary."

PERSIFER M. SMITH, BREVET-MAJOR-GENERAL COMMANDING, TO THE ADJUTANT-GENERAL, MARCH 15TH, 1849 (p 95).

"I have assumed as the opinion and deci- "sion of the Government that the govern- "ment existing in Upper California on the "30th of May was a government *de facto*, "which must from necessity, be presumed to "have existed and to continue with the con- "sent of the people, for, as the 'full and exclu- "sive power of legislation for the territories "is in Congress,' the only other alternative "would be anarchy, until Congress shall act; "that the laws of Mexico formerly in force "in California and not repealed on that day, "nor contrary to the laws, constitution and "treaties of the United States, remain in vigor, "and that by the treaty with Mexico, Califor- "nia became part of the United States "* * * Consequently, the laws of "the United States in relation to trespas- "ses on the public lands, in cutting timber, "mining, etc., are in force, and should be exe- "cuted. * * *

"It is evident, our revenue laws being in "force here, dutiable goods cannot be brought "in unless they pay duty, nor landed but at

"a port of entry; and there being no port of "entry in the Territory and no collectors ap- "pointed, all such goods must be sent away. "But * * * I have instructed Colonel "Mason that, although no duties can be ex- "acted from any vessel or on any goods, yet, "if the parties interested prefer it, rather than "go away to their entire ruin and the in- "convenience of the people here, they may "deposit the amount of duties and fees paya- "ble in ports of entry, subject to such disposi- "tion as Congress may make of them, and "land their goods."

See also General Smith's circular of April 1st, 1849, to the same effect (p. 101).

GENERAL SMITH TO THE SECRETARY OF WAR,

June 20th, 1849 (p.).

"During the military occupation of California sums were collected as military contributions. After the news of peace a revenue, conformable to the tariff was collected. On my arrival the acting collectors were instructed not to exact duties but to receive them as deposits at the door of the Treasury, awaiting the action of Congress. The revenue laws (without our knowledge) were extended over California at the same time (March 11th), and all sums thus collected are now in the hands of the quartermaster. They amount to nearly half a million. The military contributions, under a late law, can be paid into the Treasury; but the revenue collected after the peace and up to March 10th, is not money collected according to law. The money collected since is due by law, but not collected according to law, while the collector is yet absent. As the money will finally go into the Treasury, some way or other, it is desirable

that some disposition should at once be made of it, and I would suggest that all the disbursing officers authorized to draw, should cash their drafts here out of this fund, and send the drafts home to remain subject to final action."

APPENDIX II.

Mr. McCulloch's Letter to the Collector of the Port of New York as to goods brought from Alaska.

"TREASURY DEPARTMENT,
"April 6, 1868.

"H. A. SMITH, Esq.,
"Collector, N. Y.:

"*Sir.*—Your communication of February "7th is received, reporting upon the letter of "the Secretary of State relative to the request "of the Russian Minister for the free entry of "certain oil shipped from Sitka for San Fran-"cisco, and re-shipped thence to your port in "bond.

"The request for free entry of said oil was "made on the ground that the oil was shipped "from Sitka after the ratification of the treaty "by which the Territory of Alaska became the "property of the United States.

"The treaty in question was ratified on the "20th of June, 1867, and the Collector at San "Francisco has reported that the manifest of "the vessel shows the oil to have been shipped "from Alaska on the 6th day of July, 1867, "and that the shipment consisted of 52 "packages.

"Under these circumstances you are hereby "authorized to admit said 52 packages of oil "to entry free of duty.

"Please report your action under these in-"structions.

"I am, very respectfully,

"(S'd) H. MCCULLOCH,
"Secretary."

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